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No. 627

IN THE

Supreme Court of the United States

October Term, 1962

Aerovias Interamericanas de Panama, S.A., et al.,
and
Lineas Aereas de Nicaragua, S.A.,
Petitioners

v.

Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INDEX

Page

Opinions below ... 2

Jurisdiction ... 2

Questions presented ... 2

Treaties and executive agreements involved ... 4

Statement ... 6

Reasons for granting the writ ... 21

1. The court below has so far departed from the ordinary course of judicial proceedings and has so far disregarded the decisions of this court as to require exercise of the supervisory powers of this court ... 22
    - A. The Court below has disregarded all principles of treaty interpretation in holding that lease agreements of the defendant are "inconsistent" with the terms of the Chicago Convention ... 23
        - (1) The decision violates the plain and accepted meaning of words used in both the English and Spanish texts ... 23
        - (2) The decision overlooks legislative history showing that Article 82 relates only to agreements of airlines with other States or nationals of other states ... 26
        - (3) Article 15 of the Chicago Convention is self-executing and is in full force and effect 27
    - B. The higher rate charged Braniff airlines cannot be accepted as the criterion established by Article 15 of the Chicago Convention ... 31
    - C. The opinion of the court below with respect to most-favored-nation rights rests on a spurious issue wrongly decided ... 34
        - (1) The question of rights under a most-favored-nation clause is a spurious issue ... 35

Page

(2) Even if the issue of a most-favored-nation clause were presented, the court below decided it erroneously 37

(3) Confusion of "most-favored-nation" clauses with a clause granting "national" treatment is without justification on any ground 38

D. The Big Four furnished no valuable consideration for their preferential landing charges enjoyed under their lease agreements 38

E. Independently of the Chicago Convention, the bilateral agreements confer rights that adequately support the judgment of the district court 42

(1) The bilateral agreements have equal dignity with formal treaties 44

(2) The bilateral agreements contain no provision comparable to Article 82 of the Chicago Convention 45

2. The issues here involved are of great and continuing importance to the petitioners, to their States and to the United States 46

Conclusion 48

Appendix A 1a

Appendix B 14a

Appendix C 18a

Appendix D 29a

Appendix E 31a

CITATIONS

CASES: Page

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 39
Asakura v. Seattle, 265 U.S. 332 38
Bacardi Corp. v. Domenech, 311 U.S. 150 .... 18, 22, 32, 38
Bartram v. Robertson, 122 U.S. 116 .... 20, 38
Charlton v. Kelly, 229 U.S. 437 22
Chew Heong v. United States, 112 U.S. 536 21
Clark v. Allen, 331 U.S. 503 38
Colonial Air Lines, Inc. v. Adams, 87 F. Supp. 242 44
Continental Bank v. Rock Island Ry., 294 U.S. 648 39
Factor v. Laubenheimer, 290 U.S. 276 22
Geofroy v. Riggs, 133 U.S. 258 22
Haver v. Yaker, 9 Wall. 32 38
Head Money Cases, 112 U.S. 580 21
Highland v. Russell Car Co., 279 U.S. 253 39
Iannone v. Radory Construction Corp., 285 App. Div. 751 (N.Y.) aff'd per cur. 1 N.Y. 2d 671 31
John T. Bill Co. v. United States, 104 F. 2d 67 37
Jordan v. Tashiro, 278 U.S. 123 22
Kolovrat v. Oregon, 336 U.S. 187 22
Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467 39
Nielsen v. Johnson, 269 U.S. 47 35
Nielson v. Johnson, 279 U.S. 47 38
Norman v. B. & O. R. Co., 294 U.S. 240 39
Northeast Airlines v. Walter Weiss, 113 So. 2d 884 cert. denied 113 So. 2d 772 (Fla.) 15
Rocca v. Thompson, 223 U.S. 317 38
Santovicenzo v. Egan, 284 U.S. 30 .... 22, 34, 38
State of Russia v. National City Bank, 69 F. 2d 44 44
Sullivan v. Kidd, 254 U.S. 433 .... 21, 22
Terrace v. Thompson, 263 U.S. 197 35
The Amiable Isabella, 6 Wheat. 1 39
Tucker v. Alexandroff, 183 U.S. 424 .... 21, 22
United States v. Belmont, 301 U.S. 324 44
United States v. D'Auterive, 10 How. 609 22
United States v. Pink, 315 U.S. 203 44
United States v. St. Louis Terminal, 224 U.S. 383 47
United States v. Texas, 162 U.S. 1 35
Ware v. Hylton, 3 Dall. 199 22

Page

TREATIES, EXECUTIVE AGREEMENTS AND STATUTES:

Agreements Respecting Air Transport Services (Bilaterals) With: 6, 10, 16, 42, 43, 44, 45, 46

Brazil, September 6, 1946, Art. III(1), 61 Stat. (4) 4121, 4126, T.I.A.S. 1900 (effective October 6, 1946) 5, 8, 46

Colombia, October 24, 1956, Art. 7(a), effective provisionally January 1, 1957 (State Dep't Press Release, October 25, 1956) 5

Ecuador, January 8, 1947, Art. 3(a), 61 Stat. (3) 2773, 2774, T.I.A.S. 1606 (effective April 24, 1947) 5, 6, 43

Mexico, March 7, 1957, Art. VII(a), 8 U.S.T. & O.I.A. 295, 310, T.I.A.S. 3776 (effective June 5, 1957); August 15, 1960, Art. 7(a), 12 U.S.T. & O.I.A. 60, 65, T.I.A.S. 4675 (effective provisionally August 15, 1960, definitively January 17, 1961) 5

Panama, March 31, 1949, Art. III(a), 63 Stat. (3) 2450, 2452, T.I.A.S. 1932 (effective April 14, 1949) 5, 16, 17, 44

Peru, December 27, 1946, Art. 3(a), 61 Stat. (3) 2586, 2587, T.I.A.S. 1587 (effective December 27, 1946) 6, 46

Venezuela, August 14, 1953, Art. 4(a), 4 U.S.T. & O.I.A. 1493, 1498, T.I.A.S. 2813 (effective August 22, 1953) 6

Arrangement with Great Britain for Air Navigation, April 5, 1935, 49 Stat. (2) 3720 (effective May 5, 1935) ....28, 30(a)

Bilateral Agreements. See Agreements Respecting Air Transport Services ....

Chicago Convention. See Convention with Other Governments Respecting Civil Aviation ....

Civil Aeronautics Act of 1938 45

Page

Convention with Other Governments Respecting Civil Aviation (Chicago Convention) December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591 (effective April 4, 1947):
  Art. 15 .... 2, 4, 7, 10, 16, 19, 20, 23, 24, 27, 29, 30, 31, 33, 34, 35, 44, 45
  Art. 44 .... 32, 33
  Art. 80 28
  Art. 82 .... 2, 4, 19, 23, 25, 26, 27, 30, 45, 46

Executive Agreements. See Agreements Respecting Air Transport Services ....

Federal Airport Act 15

Habana Convention on Commercial Aviation (Pan American) February 20, 1928, 47 Stat. (2) 1901, T.S. No. 840, effective as to the United States August 26, 1931 .... 28, 29

Pan American Convention on Commercial Aviation (Habana) February 20, 1928, 47 Stat. (2) 1901, T.S. No. 840, effective as to the United States August 26, 1931 .... 28, 29

Paris Convention, October 13, 1919, Dep't of State Publication 2143 29

Protocol Relating to Certain Amendments to Convention on International Civil Aviation, June 14, 1954 [1957] 8 U.S.T. & O.I.A. 179, T.I.A.S. 3756 (effective December 12, 1956) 30

Protocol Relating to Certain Amendments to Convention on International Civil Aviation, February 21, 1961, T.I.A.S. 5170 (effective July 17, 1962) 30

Treaties in Force, State Department Annual Publications 29

28 U.S.C. Secs. 1331, 1332, 1254(1) 2

Page

MISCELLANEOUS:

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David, *I.C.A.O. Activities Affecting the United States Airports*, Papers Presented at the First Annual Meeting of the Airport Operators Council, pp. 42-45 .... 28, 29

Dodgson, *Through the Looking Glass*, c. 5 24

Hackworth, *Digest of International Law* (1943):
  Vol. 3, § 286 31
  Vol. 5, § 501, pp. 269-270 35
  Vol. 5, p. 273 37
  Vol. 5, pp. 271-277 37

40 Op. A. G. 451 45

1 Oppenheim, International Law, Sec. 580, pp. 972-973 (8th ed. Lauterpacht 1955) 37

Port Authority Resolution No. 56 .... 8, 15, 16

Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1—December 7, 1944, Dep't State Publication 2820 (1948)
  Commentary on the Developments of the Individual Articles of the Convention on International Civil Aviation:
    pp. 1380, 1383-1384 36
    pp. 1393-1394 26
  Document 16:
    pp. 554, 557, 561 .... 35, 36

Page

Document 454:
  - p. 616 26
  - p. 639 26

Document 467:
  - p. 642 26
  - p. 645 26
  - Page 128 43
  - Page 616 26
  - Page 639 26
  - Page 654 26

Websters Unabr. Dictionary (2d ed.) 25

IN THE

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Petitioners

v.

Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgments of the United States Court of Appeals entered in the above cause on August 31, 1962, reversing the judgments of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, filed July 3, 1961 (R. 373) is officially reported in 197 F. Supp. 230. The opinion of the Court of Appeals for the Fifth Circuit (R. 732; App. A, pp. 1a-13a) is reported in 307 F.2d 802.

JURISDICTION

The matter in controversy exceeds $10,000.00 in the case of each petitioner, arose under a treaty of the United States, and was between a citizen of a State and subjects of foreign states. Jurisdiction of the United States District Court for the Southern District of Florida was based on 28 U.S.C. §§ 1331 and 1332 (R. 151). The judgments of the Court of Appeals for the Fifth Circuit here sought to be reviewed were dated and entered on August 31, 1962 (R. 746, 747: App. B, pp. 14a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Are 20-year lease agreements between United States international airlines and the Miami airport authority, which agreements provide for airport charges to such lessee airlines, "inconsistent obligations" within the ambit of Article 82 of the Chicago Convention, so as to make ineffective Article 15 of that Convention requiring that airport charges to petitioners' foreign-registered aircraft engaged in international air services shall "not be higher" than the airport charges for United States aircraft engaged in similar international air services?

2. Under Article 15 of the Chicago Convention, is the right of petitioners' foreign-registered aircraft in

international service, to use of the Miami airport at charges not higher than those exacted of competing United States airlines for the similar use of the airport by aircraft carrying 67% of all international traffic, nullified or avoided by the mere fact that one small United States airline, flying to only six Latin-American countries and carrying only 2% of the international traffic at such airport, has been paying landing charges not less than those paid by petitioners' foreign-registered aircraft?

3. Does the valuable consideration exception to the most-favored-nation clause as interpreted and applied by this Court in 1887 and 1888 apply to nullify rights under a multilateral aviation treaty executed in 1944, effective in 1947, where the treaty contains no "most-favored-nation" clause but provides that airport charges to foreign aircraft shall "not be higher" than "those that would be paid by its [United States] national aircraft"?

4. Independently of the Chicago Convention, do the respective bilateral Air Transport Services Agreements of the United States with the seven Latin-American States of which seven of the foreign airline petitioners here are nationals, confer upon the petitioners a presently enforceable right to airport charges not higher than those imposed on United States national aircraft used by the principal competing United States airlines engaged in similar international air services?

TREATIES AND EXECUTIVE AGREEMENTS INVOLVED

The Convention with Other Governments Respecting Civil Aviation, December 7, 1944, Arts. 15 and 82, 61 Stat. 1180, 1184, 1203, T.I.A.S. 1591 (effective April 4, 1947) (commonly known as the Chicago Convention) provides:

> "Article 15
>
> "Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject, to the provisions of Article 68 be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.
>
> "Any charges that may be imposed or permitted to be imposed by a contracting State for use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,
>
> "(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and
>
> "(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

* * * * * * * * *

> "Article 82
>
> "The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting

State which, before becoming a member of the Organization has undertaken any obligation toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention."

Executive Agreements (Air Transport Services Agreements) with:

Brazil, September 6, 1946, Article III(1), 61 Stat. (4) 4121, 4126, T.I.A.S. 1900 (effective October 6, 1946).

Colombia, October 24, 1956, Art. 7(a), effective provisionally January 1, 1957 (State Dep't Press Release, October 25, 1956).

Ecuador, January 8, 1947, Art. 3(a), 61 Stat. (3) 2773, 2774, T.I.A.S. 1606 (effective April 24, 1947).

Mexico, March 7, 1957, Art. VII(a) [1957] 8 U.S.T. & O.I.A. 295, 310, T.I.A.S. 3776 (effective June 5, 1957); August 15, 1960, Art. 7(a) [1961] 12 U.S.T. & O.I.A. 60, 65, T.I.A.S. 4675 (effective provisionally August 15, 1960, definitively January 17, 1961).

Panama, March 31, 1949, Art. III(a), 63 Stat. (3) 2450, 2452, T.I.A.S. 1932 (effective April 14, 1949).

Peru, December 27, 1946, Art. 3(a), 61 Stat. (3) 2586, 2587, T.I.A.S. 1587 (effective December 27, 1946).

Venezuela, August 14, 1953, Art. 4(a), [1953] 4 U.S.T. & O.I.A. 1493, 1498, T.I.A.S. 2813 (effective August 22, 1953).

All are substantially identical with the following Art. 3(a) of the Executive Agreement with Ecuador (*supra*):

> "In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:
>
> (a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."

STATEMENT

This case involves the legality under treaty and executive agreements of airport charges imposed upon foreign air lines for use of the Miami International Airport, the second largest international airport in the United States in terms of international traffic.

Plaintiffs, petitioners here, are ten foreign airline corporations of ten Latin American countries,[1] all engaged in international air services between Miami, Florida, and points in their own countries and elsewhere. The defendant Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority, is the owner of Miami International Airport.

The original complaint by petitioners and others was filed December 19, 1958, in the United States District Court for the Southern District of Florida.

In pertinent substance petitioners' fifth amended complaint, filed October 21, 1960 (R. 148, 152-156) alleged that their cause of action arose under:

(a) Article 15 of the Convention with Other Governments Respecting International Civil Aviation, commonly known as the Chicago Convention, and providing in section 15 as quoted above, p. 4;

(b) As to seven petitioners, Air Transport Services Agreements between the United States and their respective governments in which in substantially identical language (e.g. the Brazilian agreement) it is provided that:

---

[1] 1. Aerovias Interamericanas de Panama, S.A. (APA) of Panama.

2. Aerolineas Peruanas, S.A. (APSA) of Peru.

3. Compania Ecuatoriana de Aviacion, S.A. (CEA) of Ecuador.

4. Empresa Guatemalteca de Aviacion, S.A. (Aviateca) of Guatemala.

5. Empresa de Transportes Aerovias Brasil, S.A. (REAL) of Brazil.

6. Guest of Aerovias Mexico, S.A. (Guest) of Mexico.

7. Lloyd Aereo Colombiano, (Lloyd) of Colombia.

8. Rutas Aereas Nacionales, S.A. (RANSA) of Venezuela.

9. Transportes Aereos Nacionales, S.A. (TAN) of Honduras.

10. Lineas Aereas de Nicaragua, S.A. (LANICA) of Nicaragua.

> "The charges which either of the contracting parties impose or permits to be imposed on the airline or airlines designated by the other contracting party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."[2]

The complaint further alleged and the trial court found that the respondent Port Authority operates the Miami International Airport as a public airport open to "public use" within the meaning of Article 15 of the Chicago Convention (R. 154, 394); that the Port Authority collects charges and operational fees from various users of the airport, including plaintiffs and plaintiffs' suppliers and the amounts thereof are imposed and levied in part pursuant to Resolution No. 56 of the Port Authority adopted in September 1946 and amended in February 1960 (R. 154, 398). The complaint further alleged and the Trial Court found that the various charges and operational fees, including indirect charges under concession contracts of suppliers of gasoline, oil, fuel and food, required by the Port Authority to be paid by the plaintiffs for the use of the facilities of the airport are substantially higher than those exacted from the so-called Big Four airlines that make substantially identical use of the same public airport—Pan American World Airways, Eastern Airlines, Inc., Delta Air Lines, Inc., and National Airlines, Inc.—and substantially higher than those that would be paid by Pan American and National, the two of the four that operated United States national aircraft in international airline services similar to those in which all plaintiffs engage (R. 154-155, 398, 399).

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[2] Art. III (1) Agreement with Brazil 61 Stat. 4121, 4126; TIAS 1900 (effective October 6, 1946).

This article was adopted from, and is substantially identical with Article 4(a) of the Form of Standard agreement incorporated in the Final Act of the International Civil Aviation Conference signed at Chicago on December 7, 1944; (*Proceedings of the International Civil Aviation Conference* (1944), p. 128 (Dept. of State Publication 2820)).

The complaint alleged (R. 157-158) and the Trial Court found (R. 398) that the plaintiffs pay five types of airport charges, four of which are not imposed upon the Big Four at all, viz.:

First: $.50 passenger terminal charge

Second: $2.00 per ton cargo terminal charge

Third: 5% indirect surcharge on all aviation gasoline and oil

Fourth: 5% indirect surcharge on all meals to be served aloft, and purchased at the airport.

and that the fifth type of charge, the landing charge, paid by plaintiffs for uses of the airport was substantially higher than the landing charges which are paid or would be paid by Pan American (hereinafter called Pan Am) and by National for the same uses (R. 398-399).

The complaint alleged (R. 154), and the trial court found, that all plaintiffs are engaged in "similar international air services" to those of Pan Am and National (R. 395).

The complaint further alleged (R. 155-156) and the trial court found (R. 393-394) that such higher charges to plaintiff-petitioners violate (a) Article 15 of the Chicago Convention (supra, p. 4); and (b) the similar articles of the Air Transport Services Agreements cited above, applicable to seven of the petitioner airlines.

The amended complaint sought (R. 160) and the trial court issued (R. 437) an injunction against the collection of all such higher and extra charges for use of the airport.

The amended complaint had prayed that the injunction enjoin the collection of any higher landing charges than the *average* charge per landing that would be paid by Pan Am and National for their aircraft engaged in similar international operations (R. 161). The injunction of the trial court did not contain this requested provision but provided—

> "The defendant is entitled, however, to charge these plaintiffs on a scheduled flight basis rather than on an actual flight basis under the identical provisions which are applied to Pan Am and National as stated in the landing charges section of their lease agreements. (R. 439, 440)

The amended complaint also sought (R. 158-160) refunds to each of the petitioners of so much of the amounts of airport charges paid by them within four years prior to the date of the original complaint as exceeded the amounts which they would have paid under the Big Four scale of charges. The trial court, as an incident to the injunctive relief, awarded money judgments for such claimed refunds, as shown by proof of record, except as to the amounts claimed for the 5% meal charges (R. 428, 429).[3]

As of the date of the trial there were 12 foreign airline plaintiffs in the consolidated case. A thirteenth plaintiff, Lineas Aereas Nicaragua, S.A. (LANICA) had been dismissed for procedural reasons (R. 383). LANICA filed a new separate suit (R. 488); its case was decided similarly by the trial court (R. 537, 549) and was consolidated with the others in the Court of Appeals (R. 691). The trial court withheld any relief for three Cuban airline plaintiffs but retained jurisdiction as to them (R. 425). Hence the ten petitioners were the only foreign airlines before the Court of Appeals.

The defenses of the respondent involve in part the history of the development of the airport. The facts are stated substantially correctly by the opinions of the District Court (R. 376 et seq.) and the Court of Appeals (R. 735-738; App. A, pp. 3a-6a).

The original airport, a fraction of its present size, was owned by Pan American World Airways, Inc. Other adjoining tracts, improved by various airport facilities were owned by the United States Government and included the adjacent property known as the "Convair property" (App., p. 3a).

In the latter part of 1945 the Pan Am airport, consisting of 223 acres was transferred to Dade County, Florida, in exchange for delivery to Pan Am of $2,500,000 revenue bonds issued by Dade County, payable solely from the revenues of the airport. At about the same time in a three-way transaction between Eastern, Defense Plant Corporation of the United States and the newly created Dade County Port Authority (respondent herein), the so-called Convair property was acquired by the Port Authority (App., p. 4a). Eastern supplied the purchase price of $700,000 paid to the government, the Port Authority took title and leased the property to Eastern for a long period of years for Eastern's exclusive use. Eastern's rentals under that lease were to be credited against the $700,000 which was considered pre-paid rent.[4] Pan Am leased back from the Port Authority buildings for its exclusive use which it had just transferred to the Port Authority. The County acting as Dade County Port Authority took over the operation of the airport on January 1, 1946. (R. 377)

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[3] The plaintiff APSA, the Peruvian airline, was awarded an injunction but no refund because it commenced services into Miami only 2½ months prior to the trial, which was after the date covered by the proofs of record on refunds.

Through divers gifts from the United States government and through some additional purchases of large tracts made with funds provided by the United States government, the original size of the airport increased considerably through the years (R. 377).

On December 11, 1945 the respondent entered into a lease agreement for a term of 20 years commencing January 1, 1946 with Pan Am for the rental of certain property and facilities of the airport.[5] Effective the same date, the respondent executed three other lease agreements identical in form with the Pan Am lease.

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[4] Stipulated Exhibit 18, pp. 16-17, [unless otherwise indicated references to exhibits are to unprinted original exhibits].

[5] Stipulated Exhibit 2, parts printed at R. 632-647.

with the following: Eastern Airlines, Inc., National Airlines, Inc., and Delta Airlines, Inc. (R. 377). At the time of the execution of these leases with the Big Four Pan Am was the only United States airline rendering international air services from Miami (R. 377). National, another member of the Big Four, began flying internationally in 1947 between Miami and Havana, Cuba (R. 377). Because of the Cuban situation, National early suspended service to Havana (R. 395); and very recently Pan Am also suspended such service. The District Court found (R. 377-378):

> "On February 27, 1946, a fifth lease agreement, substantially identical in form with the Big Four leases was entered into between the defendant and Taca Airways Agency, Inc., a service company for TACA, S.A., a foreign air carrier, domiciled in the Republic of El Salvador. Taca used the airport in its international operation until about February 1948, when it ceased permanently to operate its aircraft to Miami. Its lease was shortly thereafter terminated by mutual agreement of the parties."

While it is possible that similar lease arrangements were offered to other airlines at that time, which airlines did not accept them, there is, other than mere assertion, no substantial evidence of record so showing. Certainly there is no contention or evidence that any of the ten foreign airline petitioners were ever accorded the opportunity of entering into such lease agreements. Of course, all of the petitioners began to fly to Miami at much later dates, the first to arrive being the Brazilian airline petitioner, known as REAL, late in 1948.[6]

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[6] Stipulated Exhibit 26.

The rental commitments of the five airlines in 1946 were as follows (Stipulated Exh. 3):

Name of Airline	*Total Monthly Rent*
Pan Am	$11,434.58
Eastern	1,097.75
National	85.63
Delta	493.36
TACA	1,380.55

The District Court found that these rentals are not higher per square foot for the same type of space than rentals paid by the plaintiffs (R. 396,397). While the Big Four have since increased their rental areas substantially and consequently pay considerably more rent now than they did in 1946, some of the foreign airlines, none of whom were there in 1946 nor even in 1947,[7] today pay substantial rentals (Stipulated Exh. 4, pp. 4-6):

Abbreviated Name of Petitioner	*Total Monthly Rent*
REAL (Brazil)	$ 956.09
Guest (Mexico)	835.88
RANSA (Venezuela)	2,644.66
TAN (Honduras)	1,631.73

It was not until 1955 that the third United States international airline, Braniff International Airways, began international air services out of Miami (R. 378). Braniff is comparatively small in the international field carrying only 2% of the Miami international traffic, whereas Pan Am carries 64% and National 3%. Braniff serves only 6 countries in Latin America (five being the homelands of five petitioners). Pan Am serves all countries of Latin America (R. 395).[8]

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[7] Date when each petitioner began service to Miami International Airport set forth in Stipulated Exhibit 26.

On October 1, 1946 the Port Authority promulgated its Resolution No. 56 establishing the schedule of charges for all airlines other than the Big Four (R. 652-654). It is the substantially higher charges provided therein, and other related charges from which the Big Four are exempt, against which petitioners complain. These impose upon petitioners an average charge per aircraft landing 1800% higher than that for the Big Four (App., p. 27a). While the Court of Appeals refers to these charges as the Port Authority's "usual schedule of charges for landing and other aviation fees" (App. A, p. 1a) it should be noted that such charges apply only to 25% of the total (domestic and international) aircraft landings. This is because the preferred Big Four airlines make 75% of the total landings and do 67% of the international business.[9]

As pointed out by the Court of Appeals (App. A, p. 6a) the two sets of airport charges have been a matter of dissatisfaction for many years. The complaints mentioned by the Court of Appeals were not however lawsuits but merely protests to the Port Authority itself requesting equality of rates.[10] The only litigation prior to this was the Northeast Airlines suit in the Florida courts in which the complaint of Northeast, a domestic U.S. airline against higher airport charges under the Federal Airport Act was sustained,[11] and the case later settled.

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[8] App., p. 20a-21a. Stipulated Exhibit 13 showing schedules of various airlines.

[9] Stipulated Exhibit 23; Plaintiffs' Exhibit 31 (attached Exh. A); App., p. 27a.

[10] Stipulated Exhibit 19.

[11] Northeast Airlines v. Walter Weiss, 113 So. 2d 884 (Fla. Dist. Ct. App. 1959) cert. denied, 116 So 2d 772 (Fla.).

The Answer of the respondent to the fifth amended complaint (R. 164) was regarded by the trial court as raising the following defenses (R. 386):

That Resolution 56 does not violate Article 15 of the Chicago Convention or the corresponding provisions of the various Bilateral Service Agreements; that the Treaty in any event is not self-executing; failure of plaintiffs to exhaust administrative or diplomatic remedies; lack of equity; laches and statute of limitations; equitable estoppel and estoppel to recover monies voluntarily paid (R. 386).

Opinion of Trial Court.—After trial held December 6 and 7, 1960, the District Court on July 3, 1961 filed its memorandum opinion dated June 30, 1961 (R. 373). The Court after making the findings of fact above mentioned, carefully analyzing the evidence and reviewing the law, held that the enforcement of Resolution No. 56 and other extra charges of the respondent imposed upon the petitioners was a direct and unequivocal violation of Article 15 of the Chicago Convention. (R. 393-394).

The District Court found that because of the scale of charges fixed in the Big Four lease agreements (R. 632-634) the petitioners' charges aforementioned were substantially higher than those paid or payable by the Big Four for the same uses of the airport (R. 398-399).

The aircraft of all plaintiffs below, except those of one plaintiff, were registered in countries which were at all times here involved contracting States to the Chicago Convention. The one exception was the aircraft of APA of the Republic of Panama which did not ratify the treaty until 1960. However, the District Court observed that Panama had a Bilateral Air Transport Services Agreement with the United States, effective April 14, 1949, 63 Stat. 2450, which in Article 3(a) thereof incorporates the form agreement [12] adopted by the Final Act of the Chicago Convention prohibiting the imposition on foreign aircraft of airport charges higher than those imposed upon national aircraft. The District Court held that this Executive Agreement had equal dignity with a treaty requiring the same relief for APA as for the other foreign airline plaintiffs (R. 390).

The opinion also held that the other Bilateral Air Transport Service Agreements executed by the United States and the nations of domicile of all the plaintiffs except TAN of Honduras and Aviateca of Guatemala,[13] although not individually ratified by the Senate, have the same status as formal treaties in every respect, and that all conclusions with respect to the Chicago Convention shall be considered equally applicable to the corresponding provisions of the said Service Agreements (R. 390-391).

The Court rejected the defendant's attempts to justify the preferential treatment of Pan Am and National, the two United States international operators (R. 399-400);

1. The contingent liability assumed by each of the Big Four, under their 1945 leases to pay possible operational deficits: (a) terminated on July 1, 1947 and was formally eliminated from the leases by amendment on

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[12] See page 8, supra, n. 2.

[13] Nicaragua, the homeland of LANICA, the consolidated petitioner, was party to no bilateral agreement with the United States.

August 8, 1950 (R. 399); (b) was meaningless even while in force because, while para. 5(d) of Article II provided for increase in charges to the Big Four[14] if there was a deficit in operation of the airport, profits over and above a specified working capital fund were required to be paid to the Big Four (R. 400).

2. Defendant's contention that as large tenants with large rental commitments, the Big Four were entitled to special consideration, has no merit because National, under the first year of its lease paid only $85.93 per month, whereas RANSA, one of the plaintiffs, now pays $2,644.76. In any event, the treaty test is not "reasonableness" nor "discrimination." The prescribed requirement is that the charges "shall be no higher than" (R. 400).

The Court also rejected (R. 401) the contention that the treaty requirements were satisfied because Braniff, a relatively small United States airline in international flight service, pays charges on the same basis as plaintiffs (citing *Bacardi Corporation of America* v. *Domenech,* 311 U.S. 150, 165).

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[14] The lease agreements imposed a burden more apparent than real since each provided (Art. II, para. 5, subpara. (d)) (App., p. 19a):

> "The Lessee *and all other air transportation companies operating on the airport* shall within thirty days after written demand therefor, pay a special assessment sufficient to make up said deficit, which assessment shall be apportioned among said companies ratably in accordance with the number of flights scheduled to land at the Airport during the fiscal year in which such deficit occurred, as shown by schedules filed with the Civil Aeronautics Board.". (Emphasis supplied)

Thus, the Big Four alone were given an equity participating interest in the profits of any year but assumed only to pay a portion of the losses, proportionate to the ratio of scheduled flights of each to scheduled flights of *all carriers* during the deficit year.

The Court, citing copiously, rejected the contention that the Treaty was not self-executing (R. 402-411) and on ample authority rejected defendant's other defenses: failure to exhaust treaty grievance procedures (R. 411-416); laches (R. 417-418); equitable estoppel (R. 418); voluntary payments (R. 419-422); statute of limitations (R. 423-424).

Final decree was entered October 4, 1961 (R. 437) and order denying defendant's motion for new trial was entered November 9, 1961 (R. 461).

The defendant noted its appeal (R. 470) and plaintiffs noted their cross-appeal with respect to minor points (R. 478-479).

Court of Appeals decision.—The two appeals were consolidated on appeal (R. 691). The opinion of the Court of Appeals refers to the memorandum opinion of the District Court in 197 F. Supp. 230 for a detailed statement of the facts (R. 733; App., p. 2a) but restates in some detail certain of the terms of the 20-year lease agreements with the Big Four (R. 736; App., pp. 4a-5a). The Court of Appeals reversed the trial court on the following grounds:

1. As a first ground, the Court held that, within the meaning of Article 82 of the Convention (presumably relying on the last sentence of that Article) the Big Four agreements are obligations "inconsistent" with the provisions of Article 15; that hence Article 15, requiring that charges to plaintiffs' foreign aircraft "not be higher" than charges to the Big Four national aircraft was not effective (apparently meaning "self-executing") immediately because the United States, by Article 82 merely undertook in the future to secure the

termination of such "inconsistent" obligations (R. 742-743; App., pp. 10a-11a).

2. As a second ground, the opinion appears to hold that the requirements of Article 15 are satisfied by a showing that Braniff, a relatively small American airline flying internationally into six Latin American countries since 1955, had been subjected to the same airport charges at Miami as were the petitioners (App., p. 10a).

3. As a third ground, the Court held that private rights asserted by petitioners "include benefits from most favored nation clauses" (App., p. 8a); it then held that under *Bartram* v. *Robertson*, 122 U.S. 116 (1887) and other cases decided by this Court in 1888, the "most-favored-nation" clause when used in treaties of the United States was construed to include a "condition" either express or implied, that favors which either party to the treaty grants to a third country, shall not accrue to the other party to the treaty claiming "most-favored-nation" rights if the favor to the third country was granted for a valuable consideration. It concluded that, because the Big Four had furnished valuable consideration for their lease agreements, petitioners cannot complain of the preferential airport charges (App., p. 13a).

As to the bilateral agreements upon which seven of the petitioners relied, and which the trial court held clearly sustained their claimed right to equal treatment independently of the Chicago Convention (R. 390-391) the opinion was silent. Nevertheless, the Court of Appeals entered its judgments reversing the decrees of the trial court (R. 746, 747; App. B, pp. 14a-17a).

REASONS FOR GRANTING THE WRIT

The adjudication of rights claimed under a treaty of the United States is always a grave and solemn duty of the Federal judiciary. The honor of the Government of the United States and of its people is involved (*Chew Heong* v. *United States*, 112 U.S. 536, 540; *Head Money Cases*, 112 U.S. 580, 598) and the careful observation of the requirements of treaties with meticulous regard to the duty of good faith is enforced as an essential to the promotion of amity among the peoples of independent nations party thereto which is the main object of any treaty. *Sullivan* v. *Kidd*, 254 U.S. 433, 439; *Tucker* v. *Alexandroff*, 183 U.S. 424, 437.

The Chicago Convention Respecting Civil Aviation codifies most of the public international air law of the world to which air carriers are subject and practically every nation of the world except the U.S.S.R. is a signatory thereto. Beaumont, Legal Position of Air Carriers, 3 Int'l Law Quarterly (1950), pp. 360, 362.

Where, as here, a federal court is called upon to construe and apply a multi-lateral treaty to which such a large part of the world subscribes, it is impossible to over-emphasize the importance of rigid adherence to the basic rules of treaty interpretation repeatedly enunciated by this Court with full regard for the grave responsibility involved.

1. The Court Below Has So Far Departed From the Ordinary Course of Judicial Proceedings and Has So Far Disregarded the Decisions of This Court As To Require Exercise of the Supervisory Powers of This Court.

Recognizing the considerations peculiar to the construction and enforcement of international obligations, this Court has, by application and unswerving reiteration, established basic rules of construction of treaties:

(a) Treaties are to be interpreted according to the natural, fair and received acceptation of the terms in which they are expressed. *Ware* v. *Hylton*, 3 Dall. 199, 239-240; *United States* v. *D'Auterive*, 10 How. 609, 623; *Geofroy* v. *Riggs*, 133 U.S. 258, 271; *Santovincenzo* v. *Egan*, 284 U.S. 30, 40.

(b) Treaties are to be construed, not grudgingly, or in a niggardly fashion, but in a broad and liberal spirit, and if the language fairly admits of two interpretations, one restrictive of private rights claimed thereunder, the other liberal and furthering private rights, the more liberal construction is to be adopted to carry out the apparent intention of the parties and to secure equality and reciprocity between them. *Geofroy* v. *Riggs*, 133 U.S. 258, 272; *Jordan* v. *Tashiro*, 278 U.S. 123, 128-129; *Tucker* v. *Alexandroff*, 183 U.S. 424, 437; *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294; *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163.

(c) The meaning given treaties by the departments of government particularly charged with their negotiation and enforcement are given great weight. *Charlton* v. *Kelly*, 229 U.S. 447, 468; *Sullivan* v. *Kidd*, 254 U.S. 433, 442; *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295; *Kolovrat* v. *Oregon*, 336 U.S. 187, 194.

This Court has always indicated scrupulous care to see that these principles are observed by all the lower courts.

A. The Court Below Has Disregarded All Principles of Treaty Interpretation in Holding that Lease Agreements of the Defendant Are "Inconsistent" With the Terms of the Chicago Convention.

The particular portion of Article 15 of the Chicago Convention, upon which petitioners particularly rely, provides (61 Stat. 1184):

> "Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,
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> * * * * * * * *
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> (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

The court below, as its first ground for reversing the trial court, holds that the Big Four lease agreements fixing landing charges, inter alia, for aircraft of Pan Am and National are obligations *inconsistent* with the Chicago Convention within the meaning of "inconsistent obligations" as that term is used in Article 82 of the Convention; that hence Article 15 cannot be self-executing insofar as it requires that landing charges for aircraft of other nations "shall not be higher" than those paid by United States national aircraft (App., p. 11a).

(1) The decision violates the plain and accepted meaning of words used in both the English and Spanish texts.

In so holding the decision below disregards the plain and established meaning of a word common in the English language and makes a mockery of the conscientious attempt at international understanding.

Here the mandate of the Treaty was simple and clear. The plain purpose and effect of Article 15 of the treaty was to provide that the rates charged the aircraft of petitioners, subjects of Latin American states, should be made to accord with, or at least "not be higher * * * than" the rates charged United States national aircraft (such as Pan Am) engaged in such international air services. The lease agreements of each of the Big Four, including Pan American, with the defendant did not state in terms that they should be exclusive or that the rights to the landing charges specified therein should be exclusive. On the contrary the terms of the lease agreements indicate anticipation on the part of both parties to each agreement that the defendant would enter into similar lease agreements with other air transport companies (App. C, p. 19a). The only specific protection afforded Pan American or the others of the Big Four was that if better terms should be given to any other or subsequent lessee, the same benefits should accrue to each of them (App., p. 19a).

If both the lease agreements and the Convention are given full effect, they are in no way repugnant; rather the treaty merely provides for the removal of any discrepancy in charges for similar airport uses as between foreign aircraft and national aircraft engaged in similar international services. Thus the terms of the treaty are addressed to attaining perfect accord with the Big Four contracts.

Yet the appellate court holds the Big Four contracts "inconsistent"[15] with the treaty provisions. This basic premise of decision is such a shocking perversion of language as to lend added significance to the lower court's failure even to attempt to show how the lease agreements are "inconsistent" with the Convention.

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[15] "When I use a word," Humpty Dumpty said, "it means just what I choose it to mean—neither more nor less." Charles L. Dodgson (Lewis Carroll) Through the Looking Glass, c. 5.

In pertinent part Webster's Unabridged Dictionary (2d ed.) defines "inconsistent" as follows:

> "1. Not consistent; incompatible, incongruous, inharmonious; specif., of propositions, ideas, beliefs, etc., so related that both (or all) cannot be true or containing parts so related; as *inconsistent* statements; also, so related to something premised or understood that it cannot be true if what is thus assumed is true; as an *inconsistent* conclusion. * * *
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> "5. Without material consistency or coherence of parts.
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> "Syn.—Contradictory, discordant, dissonant, incoherent, discrepant.—INCONSISTENT, INCONGRUOUS, INCOMPATIBLE. INCONSISTENT implies contradiction or discrepancy; INCONGRUOUS, lack of harmony, or reciprocal unsuitability, often verging on absurdity; INCOMPATIBLE suggests positive opposition or contrariety, as of objects or qualities which cannot coexist."

The Spanish and French texts of the Convention, each of which are of equal authenticity with the English text (61 Stat. 1207) both use the word "incompatibles" for "inconsistent" throughout Article 82. "Incompatibles" in all standard French-English and Spanish-English dictionaries translates as the same word in English.

(2) The decision overlooks legislative history showing that Article 82 relates only to agreements of airlines with other States or nationals of other States.

The Court of Appeals apparently relied upon the third sentence of Article 82 for its theory of inconsistency of the Big Four contracts. Legislative history reveals that in the latest draft of the third sentence of Article 82 the description of the contemplated obligation on the day prior to final adoption read, as it had through numerous drafts, as follows (Doc. No. 454, Proceedings of the International Civil Aviation Conference (1944) Dept. of State Pub'l'n 2820, pp. 616, 639):

> "If an airline of any contracting State has entered into such obligations *with any non-contracting State or with any airline of a non-contracting State*, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause then to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention." (Emphasis supplied)

The change to the final form by Doc. No. 467 (Proceedings, pp. 642, 645) deleted the words "with any non-contracting State or with any airline of a non-contracting State", and inserted before the word "obligations" the words "any such inconsistent". That no change of meaning was intended is shown by the fact that the change was adopted without comment in the report of its committee meeting (Proceedings, p. 654) plus the official Commentary on the Convention, stating that the final language of Article 82 was merely a "slightly condensed version" of that Article as carried in prior drafts (Proceedings, pp. 1393-1394).

There is nothing in the legislative history of Article 82 indicating that it was ever intended to cover arrangements or obligations between nationals of the same State. Hence, even if the Big Four contracts could, by any stretch of the imagination, be considered "inconsistent" with the Convention they were not intended to be covered by Article 82 of the Convention. Municipal law was to take care of such matters.

This is confirmed by the statement in Bim Cheng, Law of International Air Transport (1962), p. 141:

> "Moreover, under Article 82, if an airline of any contracting State has entered into agreements or understandings with a foreign State, or a foreign airline which are inconsistent with the terms of the Chicago Convention, 1944, the contracting State of which the airline is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this convention."

(3) Article 15 of the Chicago Convention is self-executing and is in full force and effect.

The Court of Appeals acknowledged that the Convention was, in general, effective immediately, but held that Article 15 was not fully effective (App. A, pp. 10a, 11a), in other words that Article 15 was not self-executing.

It is nothing new in United States international aviation policy to provide equality of airport charges between national and foreign aircraft. Legislative history of the Chicago Convention substantiates this (App. pp. 31a-40a). The United States much earlier fully subscribed to the same principle in the Habana

Convention of 1928[16] and at least one prior Executive Agreement executed in 1935.[17] Because the Habana Convention was in full force and effect before, and at the time of, the negotiations of the Big Four lease agreements and the passage of Resolution 56, it is immaterial that the Big Four lease agreements were executed prior to the effective date of the Chicago Convention (Cf. Court of Appeals op., App. p. 10a, n. 4).

The Department of State has always considered Article 15 of the Chicago Convention to be self-executing (App. p. 41a). The Civil Aeronautics Board considers the Convention to be in full force and effect (App. p. 23a).

Mr. Paul T. David, Alternative United States Representative to the International Civil Aviation Organization, in an address to the Airport Operators Council (of which Miami International Airport was a member) on April 1, 1948, treated Article 15 of the Chicago Convention as fully effective, stating:

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[16] Habana Convention, February 20, 1928, Art. XXIV, 47 Stat. (2) 1901, 1907, T. S. No. 840 (effective as to the United States August 26, 1931) provided:

> "The aircraft of one contracting state engaged in international commerce with another contracting state shall not be compelled to pay other or higher charges in airports or airdromes open to the public than would be paid by national aircraft of the state visited, likewise engaged in international commerce."

In addition to the United States, Cuba, Ecuador, Guatemala, Honduras, Nicaragua, Mexico, and Panama were parties thereto. The United States and its citizens were bound by this treaty until after the effective date of the Chicago Convention and until November 29, 1947, the effective date of its denunciation pursuant to Article 80 of the Chicago Convention (61 Stat. 1180, 1203).

[17] Air Navigation Arrangement with Great Britain, April 5, 1935, Art. 7, 49 Stat. (2) 3720 (effective May 5, 1935). (App. p. 33a)

> "The Convention was ratified by the United States with the advice and consent of the Senate. Accordingly, *the provisions of the Convention are now the law of the United States* . . .
>
> ". . . On the important matter of landing charges it is provided *that a foreign aircraft operator shall not be required to pay higher charges than a national operator engaged in the same kind of services. . . .*" (David, ICAO Activities Affecting the United States Airports, Papers Presented at The First Annual Meeting of the Airport Operators Council, pp. 42-45) (Emphasis supplied)

Department of State publication entitled "Aspects of United States Participation in International Civil Aviation" (1948) (State Department Publication 3209) at page 39 treats Article 15 as fully effective, saying:

> "Article 15 of the Chicago Convention provides that each contracting state shall accord to the aircraft of other contracting states the same treatment as accorded its own aircraft with reference to charges and facilities in connection with the use of public airports, similar provisions being found in the Paris and Habana Conventions. Habana Convention, see State Department Treaty Series 840; Paris Convention, October 13, 1919, State Department publication 2143."

The two volume "Proceedings of the International Civil Aviation Conference", (1948) State Department Publication 2820, nowhere indicates that implementing legislation by the United States was believed to be needed to make the Convention fully effective as to it. The annual "Treaties in Force" publication of the

Department of State has continually listed the Chicago Convention as a treaty in force.

The Convention has been twice amended in minor respects by the United States and upon each occasion the United States Senate has advised ratification and the President has re-proclaimed the Treaty (June 14, 1954, 8 U.S.T. & O.I.A. 179, T.I.A.S. 3756 (effective December 12, 1956); February 21, 1961, T.I.A.S. 5170 (effective July 17, 1962)).

As pointed out by Judge Lieb (R. 410) the State Department made no request for implementing legislation when seeking original ratification (R. 410). Neither did it seek such legislation when, 10 and 16 years after ratification, it sought amendment. Nor does it appear that the Foreign Relations Committee of the United States Senate has ever requested a draft of proposed legislation to implement the treaty.

The interpretation of the Convention by the departments having responsibility is not binding on this Court but is entitled to great weight (see authorities, *supra*, p. 22).

Little can be added to the district court opinion devoting ten pages to careful analysis of the judicial decisions pertaining to the question of the self-execution of treaties (R. 402-411).

The Court of Appeals reached its conclusion that Article 15 was not "fully effective" only through a strained and unreasoned construction of Article 82 of the Chicago Convention.

B. The Higher Rate Charged Braniff Airlines Cannot Be Accepted As the Criterion Established By Article 15 of the Chicago Convention.

As a second ground of decision, the court below said (App. A, p. 10a):

> "Appellees, on the other hand, have at all times been afforded uniform conditions. The same charges were made against them as against Braniff, an American national flying internationally. They were a part of the same class for the purpose of charges and the contracting airlines, upon the expiration of the twenty year contracts, will join that class."

The court, thus finding two sets of national standards of charges to exist, has seized upon that of a minute factor in the United States air transport industry and thus contrived to bar petitioners from their clear treaty right to equality with the low rates of the major United States airlines that are petitioners' principal competitors.

This violates the State Department's steadfast policy of insisting that the standard contemplated by a treaty agreement for "national" treatment means first-class treatment. In this connection, see policy of State Department relative to treatment of American Jews in foreign countries, rejecting the argument that they are only entitled to second class treatment where native Jews are given such treatment. Hackworth, Volume III, Section 286. See also *Iannone* v. *Radory Construction Corp.*, (N.Y.) 285 App. Div. 751, 141 N.Y.S. 2d 311 (1955), aff'd per curiam, 1 N.Y. 2d 671 (1956).

As pointed out by the trial court in its opinion (R. 401) this Court has already answered a similar contention made in *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150. There Puerto Rico sought to justify its statutory violation of a treaty for protection of trade marks by pointing out that its statute operated to bar from treaty benefits a certain class of its own nationals as well as a class of citizens of Cuba. This Court held (p. 164):

> "In this view, the contention that a ratifying State, on due registration of a foreign mark in accordance with the treaty, is not bound to protect the owner in the use of that mark provided it refuses that protection to its own nationals necessarily fails. Undoubtedly the Contracting States are bound respectively to give to the nationals of the other Contracting States the same rights and remedies that are extended to their own nationals. . . . When protection is sought for such marks a ratifying State cannot escape the obligations of the treaty and deny protection by the simple device of embracing its own nationals in that denial. That would make a mockery of the treaty."

The Preamble of the Convention states (61 Stat. 1180):

> "Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and *that international air transport services may be established on the basis of equality of opportunity* and operated soundly and economically; (Emphasis supplied)

Article 44 states that among the aims and objectives of the International Civil Aviation Organization set up by Part II of the Chicago Convention is to foster the planning and development of international air transport so as to:

> "Insure that the rights of contracting States are fully respected and that *every contracting State has a fair opportunity to operate international airlines.*" (Emphasis supplied)

The conflict between the lower court's interpretation and the plain purpose of the parties thus manifested is emphasized by the facts of competition in this case.

Of the ten Latin-American States represented by the ten petitioners, Braniff flies only to Brazil, Colombia, Panama, Ecuador, and Peru. The only other Latin-American state it serves is Paraguay. On the other hand, Pan American serves every country in Latin America. Braniff, operating internationally only since 1955, carries but 2 per cent of the total international traffic at Miami. Pan American carries about 64 per cent. The petitioner airlines are all in direct competition with Pan American, which at the Miami airport handles probably ten times the traffic that is handled by the largest of the petitioners. The competition of Braniff is thus *de minimis*; that of Pan American is pervasive, keen, and unremitting.

Read in the light of these facts, and with due regard to the stated and agreed purpose of the treaty to permit every State to establish air transport services on the basis of "equality of opportunity," the lower court's decision makes of Braniff a mere stalking horse and the covenant of Article 15, a transparent sham.

This role of Braniff is confirmed by the Port Authority's contract with Braniff approved January 16, 1962, subsequent to the trial of this case and providing for Braniff a reduction in airport charges retroactive to July 1, 1961; Braniff was also guaranteed parity with any reduced rates that may ultimately be obtained by petitioners in this case (R. 700-703). Petitioner's motion in the District Court to add this contract to the record was denied by the District Court partly in reliance upon the Port Authority's stipulation to forego reliance on the Braniff argument on appeal (R. 719-719½; App. D, pp. 29a-30a). Without acting on renewal of the same motion in the Court of Appeals (R. 692-719½) and respondent's objections thereto (R. 721-730), the Court of Appeals in its opinion not only ignores this new Braniff contract but adopts defendant's argument made in breach of its stipulation (App., p. 10a).

It is submitted that the lower court's holding that conformity of petitioners' Miami airport charges with the charges exacted of Braniff satisfies the requirement of Article 15 so far departs from the course of judicial procedure charted by this Court as to require exercise of the supervisory powers of this Court.

C. The Opinion of the Court Below With Respect to Most-Favored-Nation Rights Rests on a Spurious Issue Wrongly Decided

The lower court attempts to lay a false foundation for its conclusion by asserting (App., p. 8a): "The private rights of appellees with which we are concerned arise under the Treaty . . . and include benefits from most favored nation clauses. *Santovincenzo* v. *Egan*, 1931, 284 U.S. 30 . . . "

With this false premise, the Court then cites and relies upon the decisions of this Court that gave effect in 1887 and 1888 to the traditional "conditional" most-favored-nation policy of the United States: Under the most-favored-nation clause, the benefit of concessions or reductions of duties made to a third state by either contracting Power accrued to the other contracting Power freely if freely made to the third State; but they accrued to the other contracting Power only in return for an equivalent, if they were made to the third State for a valuable consideration in the form of a reciprocal concession or reduction. See 3 Hackworth, Digest of International Law, § 501, pp. 269-270.

The premise is false and the conclusion is erroneous in law.

(1) The question of rights under a most-favored-nation clause is a spurious issue.

The lower court's statement that petitioners' asserted rights under the Treaty include benefits from most-favored-nation clauses is palpably false. Casual or detailed scrutiny of the Chicago Convention will fail to disclose in that Convention a single "most-favored-nation" clause. The petitioners have never contended that it contained one.

Most-favored-nation clauses were expressly rejected in the drafting of the Convention.—The fallacious nature of the issue attempted to be injected by the court below is apparent from the legislative history of Article 15 upon which petitioners rely. Reference to the legislative history of the Treaty is of course a permissible aid to construction (*United States v. Texas*, 162 U.S. 1, 23; *Terrace v. Thompson*, 263 U.S. 197, 223; *Nielsen v. Johnson*, 279 U.S. 47, 52. The United States draft of a "Proposal of a Convention on Air Navigation" submitted to the International Civil Aviation Conference at Chicago, Document No. 16, included in Section 9 a provision that any fees or charges levied against aircraft in transit "shall not be greater than those imposed upon national aircraft or aircraft of the most-favored nation"; and in section 22 there was included a provision that the scale of fees for landing of aircraft of one contracting party at public airports of another contracting party "shall be no greater than that applicable to national aircraft or to aircraft of the most-favored-nation." (Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1-December 7, 1944, Department of State Publication 2820, Doc. No. 16, pp. 554, 557, 561). The Commentary on the Development of the Individual Articles of the Convention on International Civil Aviation (id.; pp. 1380, 1383-1384) adequately discloses the fate of the United States proposal of "most-favored-nation" clauses:

> "*Article 15, Airport and similar charges*, represents a combination of Articles 9 and 22 of the United States draft convention. The drafting committee was asked by the fifth meeting of Subcommittee 2 to revise Article 22 in the light of the instructions on Article 9 referred by the fourth meeting, to make it clear that there is no obligation implied to treat domestic aircraft the same as international, and to substitute a new phrase for 'aircraft of the most-favored-nation.' The committee was also asked to eliminate any duplication between the two articles. The drafting committee's revision (Article 14; Doc. 414) was discussed at the final meeting of the Subcommittee and was referred back with four suggestions for changes. The revised article (Article 15, Doc. 454) was considered by the December 2 meeting of Subcommittees 1 and 2, in conjunction with Article 68. It was decided to delete subparagraph (b) of the latter, and transfer the proviso to Article 15. The article as so revised was incorporated in Document 467, and was approved at the joint meet-

ing of Subcommittees 1, 2 and 3 held December 4, subject to a reservation by Cuba."

The States of which petitioners are nationals were all represented by delegations to the Chicago Conference that drafted the Chicago Convention. Many of the members of these delegations are still alive. The lower court's attempt to pervert the Convention into a most-favored-nation clause arrangement is an affront to their intelligence.

(2) Even if the issue of a most-favored-nation clause were presented, the court below decided it erroneously.

In 1923 the United States policy was changed under the guidance of Secretary of State Hughes. He explained the reason for the change in a letter to Senator Lodge (5 Hackworth, Digest of International Law, p. 273):

> ". . . It was the interest and fundamental aim of this country to secure equality of treatment but the conditional most-favored-nation clause was not in fact productive of equality of treatment and could not guarantee it. . . . As we seek pledges from other foreign countries that they will refrain from practicing discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment."

This basic change in policy of the United States is well-recognized. *John V. Bill Co.* v. *United States*, 104 F.2d 67, 71, 74 (C.C.P.A. 1939); 5 Hackworth, Digest of International Law (1943) pp. 271-277; 1 Oppenheim (Lauterpacht) International Law (8th ed. 1955) § 580, pp. 972-973.

It follows that, even if the 1944 Chicago Convention included a most-favored-nation clause, and it does not, the lower court's reliance on the decisions of this court (*Bartram* v. *Robertson*, 122 U.S. 116, etc.) was misplaced in that it ignores forty years of history.

(3) Confusion of "most-favored-nation" clauses with a clause granting "national" treatment is without justification on any ground.

This court has found no difficulty in distinguishing between the meaning of a "most-favored-nation" clause on the one hand (*Rocca* v. *Thompson*, 223 U.S. 317; *Santovincenzo* v. *Egan*, 284 U.S. 30, 35) and a "national" standard on the other (*Asakura* v. *Seattle*, 265 U.S. 332, 341; *Nielsen* v. *Johnson*, 279 U.S. 47; *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 158, 164; *Clark* v. *Allen*, 331 U.S. 503, 508). The ministries of the States whose airlines are here petitioners are equally aware of the distinction and are quite aware of just what the court below has done while purporting merely to construe the Chicago Convention.

More than mere casual error of a court of appeals is here involved. The circumstances require exercise of this court's supervisory jurisdiction.

D. The Big Four Furnished no Valuable Consideration for Their Preferential Landing Charges Enjoyed Under Their Lease Agreements

Pivotal to the determination of the lower court as to the feigned most-favored nation issue, and pervading the opinion generally as a vague background equitable consideration,[18] is the erroneous impression that the Big Four, including Pan American, furnished to the Port Authority valuable consideration for the 20-year grant of low landing charges and exemption from other charges.[19] The Court of Appeals refers to the Big Four agreements as imposing on those lessees a duty to the airport to sustain any losses (App. A, pp. 4a, 5a, 13a). It also quotes a C.A.A. letter that accepts the mythical duty as an "underwriting" (App. A, p. 7, note 3).

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[18] Contrary to the implications of the court of appeals opinion, (App. A, p. 10a, and n. 4) we do not contend that the Convention requires that the Big Four agreements be set aside. Nor have we at any time sought such relief. However, it seems clear that if the Big Four contracts were violative of the provisions or policy of the Chicago Convention, they could not be sustained under *Haver* v.

Even casual examination of the Big Four lease form (R. 632-642) discloses that this "sustaining" or "underwriting" duty of the Big Four was illusory. The contract imposed on each member of the Big Four a burden as to operating losses no greater than was to be borne by every other operator landing at the airport during the year the operating deficit should be sustained.

The provision relied upon is Article II, para. 5(d) in the form of lease agreement with each of the Big Four (R. 637):

Yaker, 9 Wall. 32 (cited by the court of appeals (App. A, p. 10a, n. 4)) but would yield to the supervening exercise of the treaty power. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229, 230; *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467; *Highland v. Russell Car Co.*, 279 U.S. 253, 261; *Norman v. B. & O. R. Co.*, 294 U.S. 240, 309-310; *Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 680.

[19] Of course, even if there was such consideration, this would not be ground for writing into the treaty any exception with respect to the contracts of the Big Four. As this Court said in *The Amiable Isabella*, 6 Wheat. 1, 72: "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice."

> "(d) In the event the revenues of the Authority from sources other than the rents paid by air transportation companies for space at the Airport exclusively occupied by them shall be insufficient in any fiscal year to pay all operating expenses, such deficit shall be carried over into the budget as an operating expense for the succeeding year. The Lessee *and all other air transportation companies operating on the Airport* shall, within thirty days after written demand therefor, pay a special assessment sufficient to make up said deficit, *which assessment shall be apportioned among said companies ratably* in accordance with the number of flights scheduled to land at the Airport during the fiscal year in which such deficit occurred. . . ."

In passing, it may be noted that this obligation was to continue only until the original $2,500,000 revenue bond issue delivered to Pan Am for its airport, was redeemed (Lease Agreement, Art. 27, R. 641) and, as the trial court found, the obligation did terminate on July 1, 1947, when the issue was redeemed (R. 399).

Both courts overlooked that the "sustaining" duty as to airport operating losses was not, by the lease agreement provisions, imposed on the Big Four alone. On the contrary, as is evident from the words italicized in the subparagraph quoted above, the members of the Big Four agreed merely to pay their fair share of any annual operating deficit, a share equal to the portion of the total loss reasonably attributabe to the respective use of the airport made by each of them. The proration of the loss was among each of the Big Four *and* "all other air transportation companies operating on the Airport" measured by the relative number of scheduled landings of each in the year of the deficit.

Each of the Big Four, by its lease agreement, contracted to do no more than a non-contract airline would have been required to do, viz., pay an additional amount representing the actual cost of its own use of the airport determined on a pro rata basis. Whether or not the ratable portion of operating losses of a noncontracting carrier would have to be collected by increased landing charges in the second year, because it was not party to a contract for "assessment", or by voluntary payment of an assessment of its share of the deficit is irrelevant. Each member of the Big Four was manifestly under no contractual duty to bear more than its proportionate share of the total operating losses, and their total shares would not equal more than the proportionate share of the total properly allocable to them as a group. The "valuable consideration" founded on the assumption that the Big Four were bound to sustain any losses of the airport and were "underwriters" of the bond issue is obviously a myth.

The facts with respect to this "valuable consideration" disclose an additional absurdity in the lower court's reliance on the "most-favored-nation" clause ruling. Clearly, even the conditional "most-favored-nation" policy of the United States in force until 1923 recognized that the other contracting party should have opportunity to furnish "valuable consideration" equivalent to that furnished by the favored nation.

Here, petitioners had no such opportunity. As previously stated, supra, p. 13, none of the ten petitioners

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[20] It is worth noting that while the Big Four were required to bear only their respective shares of total losses, the right to participate in profits during the period the $2,500,000 bond issue was unredeemed, was limited to the Big Four and did not extend to the other airlines using the airport. See opinion of the trial court (R. 400).

was operating, or authorized by the C.A.B. to operate, into Miami during any of the period prior to July 1, 1947, in which Art. II, para. 5(d) of the Big Four lease agreements remained in effect. Consequently, they could never have offered or given to the Port Authority the same consideration (even if the Airport would have been willing at any time during such period to have entered into agreements with petitioners similar to those given the Big Four).

There was no evidence that any of the petitioners, after it obtained authority to operate into Miami was by the Port Authority afforded opportunity to sign leases or contracts (either with a sustaining obligation or including any other valuable consideration) that embodied the preferential landing charges enjoyed by the Big Four. Indeed, when petitioners, at various times did seek 10, 15 or 20 year leases of space and structures at the airport, they were in almost every instance refused.[21] For years, they were forced to rent on a month-to-month or year-to-year basis.

The assumption that the preferential landing charges to the Big Four may, on some vague equitable principle, be justified because they assumed a "sustaining" burden in the airport's early years is nothing more than a carefully nurtured myth.

E. Independently of the Chicago Convention, the Bilateral Agreements Confer Rights that Adequately Support the Judgment of the District Court

Entirely apart from the Convention, the Air Transport Services Agreements (commonly known as "Bilateral Agreements" or "Bilaterals") in the cases of seven of the ten petitioners confer on them the right to equality of airport charges for foreign airlines here involved and support the decree of the District Court as to these seven. The trial court so found (R. 391, 401, 426, 435)

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[21] Deposition of the Director of Dade County Port Authority pp. 44-46, Plaintiffs' Exhibit 33.

These Executive Agreements executed over the years beginning in 1946, in substance follow the model Standard Agreement adopted at Chicago as part of the Final Act of the Convention on International Aviation.[22] The bilaterals here involved and the pertinent article number in each are set out above, pp. 5-6. For convenience, that of the Ecuadorian agreement, typical of those here in suit, is here repeated. It provides:

> "Article 3
>
> "In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:
>
> "(a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services."

If anything, this clause is more specific than Article 15 of the Chicago Convention. It requires that the charges imposed by the airports of each nation on the aircraft of the other be: (1) just; (2) reasonable; and (3) equal (i.e, not "higher than would be paid" by "its national aircraft engaged in similar international services." Each of the bilaterals applies to the Miami International Airport, as appears from the route annexes of each, specifying airline routes that include as the United States terminal point, Miami, Florida (which can be served only through the Miami International Airport).

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[22] Proceedings of the International Civil Aviation Conference, Chicago, Illinois, Nov. 1-Dec. 7, 1944, Department of State Publication No. 2820, p. 128.

The Court of Appeals does not even acknowledge the existence of the Air Transport Services Agreements in its opinion except to mention that the Panama Agreement "for the purpose of this case, is as effective as the Chicago Convention." (App. A, p. 2a). The omission of the Court of Appeals to deal with the bilateral agreements was, of course, inadvertent and the result of oversight. However, there are certain distinguishing characteristics of the bilateral agreements that cannot be overlooked.

(1) The Bilateral Agreements have equal dignity with formal treaties.

The bilateral agreements are all classified by the State Department as Treaties in Force. The parties in the case at bar treated the Bilateral Agreements as having equal status with the Chicago Convention (R. 83-84). The District Court held that the Bilaterals are compacts having dignity equal in every respect with that of formal treaties (citing *United States v. Pink*, 315 U.S. 203; *United States v. Belmont*, 301 U.S. 324, 330-331; *State of Russia v. National City Bank*, 69 F. 2d 44, 48; *Colonial Air Lines, Inc. v. Adams*, 87 F. Supp. 242) (R. 390-391).

Attorney General Tom C. Clark on June 18, 1946, rendered an opinion to the Secretary of State sustaining the validity and binding effect of Commercial Aviation Agreements (the Bilaterals) between the United

States and other nations. 40 Op. A.G. 451. He held them clearly contemplated and authorized by the Civil Aeronautics Act of 1938.

(2) The bilateral agreements contain no provision comparable to Article 82 of the Chicago Convention.

The bilateral obligations as to national treatment at the airports of each country are unequivocal obligations containing no provisions such as Article 82 of the Chicago Convention upon which the Court of Appeals pitched its argument that Article 15 of the Convention was unenforceable. The petitioners grounded their actions on the bilaterals as well as on Article 15 of the Chicago Convention (R. 155-156). The District Court held that airlines of the nations that have such bilaterals had a cause of action and were entitled to injunction and refunds under the independent force of the bilaterals as well as under the Chicago Convention (R. 391, 401, 426). The opinion of the court of appeals, as stated above, fails to deal with the issue.

It is important to note that the same type of Executive Agreement pertaining to air transport services has been executed with many new countries as the expanding reach of United States airline enterprise required. These embodied the same stipulation as to reciprocal equal airport charges. Presumably, the State Department was thereby indicating to the other parties its continued adherence to the principle of unconditional equality of airport charges with those made to national aircraft. Some of the bilaterals were negotiated at the time of the Convention at Chicago and several, including two involved in this case became effective even before the effective date of the Chicago Convention: Brazil, effective October 6, 1946; Peru, effective December 27, 1946. Regarding the bilaterals as binding and effective, the State Department, on behalf of United States airlines has invoked and will continue to invoke the bilaterals, as well as the Chicago Convention, for the protection of American airlines both in Latin America and elsewhere.

As noted above, the bilaterals contain no provision even remotely resembling Article 82 of the Chicago Convention, or any other provision upon which the court of appeals could rely as an avenue for escape by the Port Authority from the duty of equal treatment that they impose.

Whatever the reason for the omission of the court of appeals to deal with the point, it is submitted that when a court of the United States denies claimed rights of nationals of seven countries under international agreements, it owes to the United States as well as the foreign nations the courtesy of more than its mere *ipse dixit*—"Reversed".

2. The Issues Here Involved are of Great and Continuing Importance to the Petitioners, to Their States and to the United States.

The basic right to equality of airport charges in international civil aviation is nothing new. It has long been regarded as a fundamental principle in international air transportation. It was embodied in the Paris Convention of 1919 (App. E, pp. 32a-33a) and unequivocally restated in the Habana Convention of 1928 (*supra*, p. 28, n. 16). It is not surprising that the Chicago Convention again reenacted this principle.

The States of Latin America cannot, of course, be reasonably expected to accept the lower court's decision as the ultimate resolution of the issue here. As the necessary result of the decision, and so long as it controls, their airlines will continue to pay airport charges in the United States that are 18 times higher than those paid by their United States airline competitors. Ninety per cent of all traffic between Latin America and the United States moves through the Miami gateway. Under the preferential system of Miami airport charges now sanctioned and perpetuated by the court of appeals decision, the average charge for aircraft of the United States airline, Pan Am, is $4.05 per landing; for aircraft of petitioners, $71.70 per landing (App. C, p. 27a).

If these circumstances remain unchanged, they can serve only as a continuing source of friction in Latin-American relations. International air transport is so important to the economic life of the majority of Latin American States that in many instances their airlines are owned in whole or in part by their governments.

History repeats itself. This case is reminiscent of substantially the same problem presented half a century ago with respect to rail carriers in the *St. Louis Terminal* case.[23] There this Court's decree required that all existing or future carriers be permitted to use the facilities of the terminal company on a plane of equality with all other carriers and, if they so desired, be permitted to acquire joint ownership of the terminal company with the other proprietary carriers.

The multi-lateral Chicago Convention now has 98 contracting States. It was proclaimed by the State Department spokesman before the Senate Foreign Relations Committee as being a "'constitution' for the postwar air world" (App. E, p. 34a). The case also involves the first occasion for vindication in a United States court of Executive Air Transport Services Agreements with the United States. The United States has executed 49 similar bilateral agreements of which seven are here involved. They are given full force and effect by the district court to grant petitioners' relief; in the court of appeals they are completely ignored and petitioners' bilateral treaty rights are nullified without the slightest pretext of reason.

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[23] *United States* v. *St. Louis Terminal*, 224 U.S. 383, 411

The case is not without importance to the larger interests of the United States. It has an interest in the continuing growth of its international airlines as well as the promotion of better understanding among the peoples of the world.

CONCLUSION

It is respectfully submitted that writ of certiorari should issue in this case to review the decisions of the Court of Appeals for the Fifth Circuit in these cases.

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November, 1962

APPENDIX A

Opinion of United States Court of Appeals, Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19476

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY, *Appellant*,

v.

AEROVIAS INTERAMERICANAS DE PANAMA, et al., *Appellees.*
(AND REVERSE TITLE)

No. 19632

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY, *Appellant*,

v.

LINEAS AEREAS DE NICARAGUA, S. A., *Appellee.*
(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

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(August 31, 1962)

[OPINION]

Before TUTTLE, Chief Judge, BELL, Circuit Judge and CARSWELL, District Judge.

BELL, Circuit Judge: These consolidated appeals are from final decrees of the District Court holding that appellant may not charge the foreign airlines according to its usual schedule of charges for landing and other aviation fees and for fees paid concessionaires by the appellees and in turn paid to appellant, but must give them the benefit of lower charges to which four others are entitled by virtue of contracts. The decrees also awarded judgments for the amount of the excess charges paid by appellees and their suppliers since 1955, together with interest.[1]

Appellant owns and operates the Miami International airport. Appellees are ten Latin American airline corporations and have made substantial use of the airport facilities in international operations during recent years. Their cause of action is premised on Article 15 of the provisions of the Convention on International Civil Aviation, the "Chicago Convention", which became effective as a treaty between the ratifying states on April 4, 1947. 61 Stat. 1180. This treaty was ratified by the United States of America and by, among others, the countries of which appellees are nationals. The Republic of Panama did not ratify the treaty until January 18, 1960, but appellee Aerovias Inter-americans de Panama, S.A., relies on an executive agreement between the Republic of Panama and this country which became effective April 14, 1949 and which, for the purpose of this case, is as effective as the Chicago Convention.

That Convention provided, in setting out principles and arrangements for the development of International Civil Aviation on the Basis of equality of opportunity, as follows: (Article 15)

> "Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft or any other contracting State shall not be higher.

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[1] The memorandum opinion of the District Court in case No. 19,476 is reported in 197 F. Supp. 230 to which reference is made for a detailed statement of the facts here involved. The court entered finding of facts and conclusions of law in case No. 19,632. The cases were consolidated for consideration by this court.

> (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engade in similar operations, and
>
> (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

B The District Court construed this article in a favored nation clause concept, but refused to consider it on the basis of determining the presence or absence of discrimination. It was treated as being an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances. We disagree and reverse.

The dispute centers around the fact that two separate schedules of charges were effective at the airport; one schedule being based on contracts made at or near the time the airport opened for business in 1946, and the other being based on Resolution No. 56 of appellant setting charges applicable to all aircraft except those of the companies who entered into the contracts. The facts are not in dispute and our decision turns on the construction of the Chicago Convention treaty in light of the undisputed facts.

C At the close of World War II, Pan American Airways, Inc. owned the 36th Street Airport near the City of Miami in Dade County, Florida, embracing 223 acres of land. The United States of America owned the adjacent Convair property consisting of 102 acres and both tracts were improved by various airport facilities. Eastern Airlines, Inc., Delta C & S Airlines, Inc. and National Airlines, Inc. were using the facilities of the 36th Street Airport under an arrangement with Pan American. Only Pan American was flying internationally.

The Board of County Commissioners of Dade County was authorized by the Florida Legislature in 1945 to establish airport facilities to be financed by ad valorem taxation on property within the county, and by revenue bonds payable solely from the revenues of any facility established. Pursuant to this statutory authority, the county commissioners acting as the Dade County Port Authority issued twenty year bonds in the principal amount of $2,500,000 payable only from anticipated revenues. These were exchanged with Pan American Airlines, Inc. for a deed to the 36th Street Airport. Appellant simultaneously borrowing $700,000 from Eastern Airlines with which to purchase the Convair property. This vested title to an existing 325 acre airport in appellant with no cash outlay. At the same time appellant entered into contracts with Pan American and Eastern whereunder Pan American leased a portion of the airport for the term of the revenue bonds and Eastern leased the Convair property for the same term. Pan American and Eastern, because of the indebtedness of the Authority, were committeed to the airport from the beginning but leases were also tendered to other airlines at the same time. National, Delta, and Taca Airways Agency, Inc., a corporation of El Salvador engaged in international service, all accepted identical twenty year leases with the amount of rent depending on space taken. Each lease contract provided that appellant and the lessees would share in the profits of the airport, and sustain it in losses for as long as appellant desired to be so sustained. The contracts required appellants to provide without expense to lessees the necessary facilities for governmental agencies such as the weather bureau, health services, and immigration and customs. Each lease set forth the same schedule of aviation fees to be charged, based on a graduated scale for flights scheduled, plus landing weight of the aircraft. The lessees and their suppliers were not to be otherwise charged for the use of the airport facilities. Each contract provided that the Authority could redeem the bond issue at any time and in such event the provision of the contracts providing for the sharing of profits and losses would become ineffective. Each lessee had the option of continuing under the contracts, save for that part, or of entering into a new ten year lease calling for rentals and airport charges comparable to those charged by comparable United States airports.

Appellant commenced operations at the airport on March 23, 1946 with a small staff, offering domestic service only. A schedule of charges applicable to airlines who did not commit themselves to the long term contract was published at that time. On September 24, 1956 appellant adopted Resolution No. 56 setting forth a permanent schedule of charges applicable to all aircraft using the facilities except aircraft of the lessees under the contracts. Appellees commenced using the facilities thereafter, one as early as 1948, and another as late as 1960, and were charged on the basis of Resolution No. 56. These charges exceeded those paid by the lessees in respect to landing charges and included the following, none of which were required of the twenty year lessees: passenger terminal charges, cargo terminal charges, and concessionaire charges, imposed on the supplier and passed on to appellees, based on five per cent of the gross sales price of gasoline, oil and meals purchased by appellees.

The growth of the airport was rapid and after little more than a year of operations appellant redeemed the original bond issue with part of the proceeds of a new issue. The profit and loss sharing arrangement under the contracts was terminated and the five contracting airlines elected to continue the use of the facilities for the remaining almost eighteen years under the favorable schedule of charges under the contracts, rather than entering into new ten year leases whereunder the charges would have been increased.

The facilities of the airport were greatly expanded and finally in 1955 it was moved to a new location. The contracts of the five original lessee airlines will expire December 31, 1965. In the meantime, Taca terminated services to Miami and its contract was mutually cancelled.

The background facts demonstrate that various airlines, other than those having the original contracts, have long been dissatisfied with the charges under Resolution No. 56 in view of the lower charges under the contracts. For example, Pan American on behalf of its subsidiary corporation, Cubana de Aviacion S.A., sought to obtain for it the rates afforded to Pan American under the contract. The matter was arbitrated and the contention of Pan American for Cubana was rejected.[2]

Complaints against the charges filed by KLM Royal Dutch Airlines and British South American Airways, Inc. in 1949 were denied, as well as the complaint filed in 1955 by Braniff International Airways, Inc., a United States airline flying internationally. Braniff has paid the same charges as those paid by appellees, all under the provisions of Resolution No. 56. All are engaged in international operations. Only Pan American of the original five lessees is now engaged in international operations. National was for some years but discontinued after the Cuban upheaval.

Some of appellees sought relief, to no avail, from the Civil Aeronautics Board and the Civil Aeronautics Authority in 1955. Their claim then was based on discrimination which the administrator of Civil Aeronautics noted would terminate with the expiration of the twenty-year contracts—December 31, 1965.[3]

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[2] Cubana, along with two other Cuban airlines were plaintiffs in this action but the court granted no direct relief to any of the three because of the "rapidly changing political situation in the Republic of Cuba," simply retaining jurisdiction as to the three.

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[3] The administrator of Civil Aeronautics, in pertinent part, replied:

> "In your letter it is alleged that the Dade County Port Authority, which owns and operates the Miami International Airport, is unjustly discriminating against all carriers using that airport other than Pan American World Airways, Eastern Air Lines, Delta C & S Air Lines, and National Airlines (hereinafter referred to as the 'sustaining airlines') because of the differences in the rates and charges imposed against those four carriers and those imposed against all other carriers for the use of the landing area and other public use areas and facilities of the airport. * * *
>
> "* * * the differential in rates and charges imposed against the sustaining airlines for the use of the landing area and other public use areas and facilities of the Miami International Airport and those imposed against all other carriers for use of such areas and facilities does not constitute unjust discrimination against such other carriers, within the meaning of the provisions of the grant agreements between the Dade County Port Authority and this Agency which obligate the Port Authority to operate the airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimniation. * * *
>
> "The rates and charges now being imposed against the sustaining airlines are those that were fixed by agreements entered into between the Port Authority and those airlines in 1945. In view of the pertinent circumstances prevailing at that time, it is the view of this Agency that the Port Authority acted reasonably in entering into such agreements, which, by their terms, were binding on the parties thereto for a term of 20 years.
>
> "In reaching this conclusion we have taken into consideration, among other things, (1) the provision in each of the agreements which, in effect, constituted an underwriting of the bonds then being issued by the Port Authority to finance the acquisition from Pan American Airways of the Miami airport; (2) the fact that in order to market the bonds it was necessary at that time for the Authority to provide some type of security other than the then anticipated but unknown revenues, such as was provided in the underwriting of the

The private rights of appellees with which we are concerned arise under the Treaty, *Edye* v. *Robertson*, 1884, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798, and include benefits from most favored nation clauses. *Santovincenzo* v.

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bond issue by the sustaining airlines; (3) the fact that the schedule of landing fees and charges prescribed in the original lease agreements with the sustaining airlines compares favorably with landing fees and charges at other comparable airports in effect at the time; (4) the fact that similar agreements were offered to all other carriers then operating on the Miami International Airport; and (5) the fact that it was not unusual in 1945 for an airport owner ot enter into agreements with airlines providing for the leasing of space on the airport and the use of the landing facilities at prescribed rentals and landing fees and charges, for terms of 15, 20 and 25 years. * * *

"Our study of the matter has also disclosed that the rates and charges now being imposed against all carriers and their suppliers, other than the sustaining airlines and their suppliers, compare favorably with the rates and charges now being imposed at other comparable airports. It is our opinion that such rates and charges are fair and reasonable in the light of all pertinent circumstances now prevailing.

"The unjust discrimination provisions incorporated in grant agreements pursuant to the Federal Airport Act, in our opinion, do not require that the airport owner refrain from charging users of the airport, rates higher than those to which other users of the same class are entitled under previously executed contracts which were reasonable when executed (see *Trans World Airlines, Inc.* v. *City and County of San Francisco*, U.S.C.A. 9th, Dec. 19, 1955, 228 F. (2d) 473, 4 Avi. 17, 866, cert. den. April 30, 1956). * * *

"Insofar as concerns the landing fees ad charges to be imposed against the sustaining airlines after December 31, 1965, it is to be noted that the 1955 amendatory agreements between those airlines and the Port Authority which revised and extended the 1945 agreements, provide that such landing fees and charges will be renegotiated six months prior to the expiration of the original terms of the agreements, in the light of the circumstances then prevailing. Under this provision, it appears that the Port Authority will be in a position to negotiate landing fees and charges to be imposed against the sustaining airlines after December 31, 1965, that are then in

Egan, 1931, 284 U. S. 30, 52 S. Ct. 81, 76 L. Ed. 151. And in construing the treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose. *Wright v. Henkel*, 1903, 190 U. S. 40, 23 S. Ct. 784, 47 L. Ed. 948; *The Yuba*, 5 Cir., 1934, 71 F. 2d 635, cert. den., 293 U. S. 589, 55 S. Ct. 104, 79 L. Ed. 684; and *Hidalgo County Water Control & Imp. Dist. v. Hedrick*, 5 Cir., 1955, 226 F. 2d 1. We proceed also under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to rights claimed under it, the latter is to be preferred. *De Geofroy v. Riggs*, 1889, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642; *Asakura v. Seattle*, 1924, 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041; *Jordan v. Tashiro*, 1928, 278 U. S. 123, 49 S. Ct. 47, 73 L. Ed. 214; and *Bacardi Corp. of America v. Domenech*, 1940, 311 U. S. 150, 61 S. Ct. 219, 85 L. Ed. 98.

The clear purpose of the treaty here was to develop international civil air transport services on the basis of equality of opportunity. The contracting nations agreed to apply their laws and regulations to the aircraft of all contracting states without distinction as to nationality. A permanent organization was established under the treaty to further its purposes, including the aviodance of discrimination between the contracting nations. Each airport in the contract-

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substantial conformity with those then imposed against all other carriers.

"In this connection, your attention is invited to Resolution No. 11144 of the Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority, adopted February 14, 1957, wherein the Port Authority warranted that on or before December 31, 1965 it will 'review its entire schedule of rates, tariffs, fees, and charges for users of airport facilities of the Authority, in all respects, in the light of circumstances and of facts that then and there exist, and, where necessary, modify, revise, or change said rates, tariffs, fees, and charges, so that they will then and there meet the legal requirements of being fair, reasonable, and not unjustifiably discriminatory or otherwise contrary to law.' * * *"

ing nations open to public use for aircraft of its nationals was to be open under uniform conditions to the aircraft of the other contracting nations.

There is nothing whatever in the treaty that would deprive the contracting airlines here of the fruits of their bargain, made before the treaty became effective, nor that would require appellant to afford the same bargain to appellees.[4] Appellees, on the other hand, have at all times been afforded uniform conditions. The same charges were made against them as against Braniff, an American national flying internationally. They were a part of the same class for the purpose of charges and the contracting airlines, upon the expiration of the twenty year contracts, will join that class. The present separate classifications of the two groups will then cease to exist and Article 15 of the treaty will become fully effective.

That this is a clear import of the treaty is demonstrated by Article 82 thereof which recognizes outstanding inconsistencies, and requires the use of best efforts by the contracting states to secure the termination of any such inconsistency:

> "The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State

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[4] Although it is not a point urged, we note that these contracts were executed after the negotiation of the treaty in 1944 but before it became effective in 1947. With respect to private rights, unlike rights of the governments involved, a treaty is effective only from the exchange of ratifications and does not relate back to effect private rights vested prior to that date. *Haver* v. *Yaker*, 1870, 9 Wall. 32, 19 L. Ed. 571.

inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention."

Of course, the treaty was effective immediately except as to these inconsistencies but its terms, insofar as applicable here, would not become completely effective until the termination of these outstanding contracts, either at the instance of this government or upon the expiration of the terms of the contracts. Cf. *De Geofroy v. Riggs*, supra, where the treaty with France permitted aliens of either country to inherit from citizens of the other, and the president of this country was to urge changes in inconsistent state laws. The treaty was effective immediately in states with consistent laws.

Appellees cannot rely in the courts on what was to be done in the future by this government to remove infraterritorial inconsistencies such as these contracts. This is a matter that addresses itself to the political branch of the government. *Foster and Elam v. Neilson*, 1829, 2 Pet. 253, 7 L. Ed. 415 and *Roberston v. General Electric Co.*, 4 Cir., 1929, 32 F. 2d 495. Thus, it is that appellees will have no cause of action under the treaty until the contracts in question are terminated, or until they expire by their own terms.

But there is yet another reason why this cause fails. Favored nation clauses may be inapplicable in situations where exceptions are made for valuable consideration. *Bartram v. Robertson*, 1887, 122 U. S. 116, 7 S. Ct. 1115, 30 L. Ed. 1118; *Whitney v. Robertson*, 1888, 124 U. S. 190, 8

S. Ct. 456, 31 L. Ed. 386; and *Kelly* v. *Hedden*, 1888, 124 U.S. 196, 8 S. Ct. 459, 31 L. Ed. 389. The compelling logic of these cases is persuasive if not controlling in this regard, and we adopt it as controlling here.

Plaintiffs in *Bartram* were importers of sugar from a Danish possession. They sought a refund of duties paid on the sugar under protest because of a favored nation clause in a treaty between this country and Denmark. This country entered into a treaty with the King of the Hawaiian Islands after the effective date of the treaty with Denmark whereunder the United States agreed to admit, duty free, certain products of the Hawaiian Islands as an equivalent for an agreement by the King to admit certain products, duty free, from the United States into the Hawaiian Islands and for the concession by the King that during the term of the treaty he would not lease or otherwise dispose of any port or other territories in his domain or grant any special privileges thereto to any other government, or make any treaty by which any other nation would obtain the same privileges relative to duties thereby secured to the United States. The court stated that the favored nation clause in the treaty with Denmark did not cover concessions like those made to the Hawaiian Islands for valuable consideration. *Whitney* v. *Robertson* and *Kelly* v. *Hedden* involved the same question as it related to duty on sugar from the Dominican Republic and a treaty with that country. The court reiterated that the favored nation clause was not intended to interfere with special arrangements upon sufficient consideration with other countries.

These well reasoned authorities, involving as they do private rights based on favored nation clauses, are analogous to the instant situation. Considered together, they teach that there may be exceptions to such clauses where based on valuable considerations. Such consideration was present here. Such is the case here. The five airlines with the original contracts joined with appellant to establish and sustain the airport in its infancy. By hindsight it can be said that they received a bargain, but the facts nevertheless show ample consideration. The contracts subsist and so long as they do, appellees cannot complain.

Having taken this view of the case, we do not reach the question of the use of a sliding or graduated scale of landing fees which appellees urge as being unjustifiable, nor the remaining defenses asserted by appellant.

Judgments should have been entered in the District Court for appellant. We REVERSE and REMAND so that this may be done.

A true copy. Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit.

By Clara R. James, *Deputy.*

September 27, 1962
New Orleans, Louisiana

APPENDIX B

Judgments entered by United States Court of Appeals. Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19476

D. C. Docket Nos. 8990 and 9820-M-Civil

Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority,
Appellant-Appellee,

v.

Aerovias Interamericana de Panama, S. A., et al.
Appellees-Appellant

(and reverse title)

Appeals from the United States District Court for the Southern District of Florida

Before Tuttle, Chief Judge, Bell, Circuit Judge, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment for appellant, Board of County Commissioners of Dade County, Florida;

It is further ordered and adjudged that the appellees, Aerovias Interamericanas de Panama, S.A., and others, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 31, 1962

Issued:

JUDGMENT ENTERED AUGUST 31, 1962

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,632

D. C. Docket No. 10,428-M-Civil

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,
Appellant-Appellee,

v.

LINEAS AEREAS DE NICARAGUA, S.A., *Appelle-Appellant.*
(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

Before Tuttle, Chief Budge, Bell, Circuit Judge, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment for appellant, Board of County Commissioners of Dade County, Florida:

It is further ordered and adjudged that the appellee, Lineas Aereas de Nicaragua, S.A., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 31, 1962

Issued:

JUDGMENT ENTERED—AUGUST 31, 1962

APPENDIX C

Excerpts from certain original exhibits certified as part of the record but not heretofore printed.

1. Excerpts from Stipulated Exhibit 1[1]

Preliminary Pre-Trial Stipulation

• • • • • • • • • •

Evidence

6. It is stipuated that Miami International Airport is the second largest airport in the United States in terms of international traffic. It ranks sixth in the United States in terms of domestic passenger traffic, and thirteenth in terms of domestic cargo traffic. Domestic airline service at Miami International Airport affords the shortest connection time intervals for international-domestic passengers and domestic-international passengers of any other airport in the Southeast United States. Similarly, it affords the best connections in the Southeast United States for both rail and air connections of cargo in international-domestic and domestic-international movements. Of all airports in the South, it is the closest in mileage to most Latin American countries. The Plaintiffs could efficiently and economically serve Miami only through the Miami International Airport.

7. Dade County, Florida, through the Board of County Commissioners, acting as the Dade County Port Authority, operates the Miami International Airport in a proprietary capacity.

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[1] Other portions of Stipulated Exhibit 1 are shown at pages of the Record. (R. 629-631)

2. Excerpts from Pan American lease agreement, dated December 11, 1945, effective January 1, 1946, Stipulated Exhibit 2 at pages 93-94.

Article XXVI

Leases with Other Air Transportation Companies

While the provisions of this instrument are in no respect dependent upon effecting lease agreements with other air transportation companies, nevertheless it is understood that the Authority shall have the right and probable will execute lease agreements forthwith with such other companies, and it is further understood that the Authority reserves the right to execute at any time hereafter lease agreements with others and to construct hangars and other buildings for them and to grant to them the right to use the landing field and all public parts of the Airport in common with the Lessee herein and all others rightfully using the airport.

The Authority covenants and agrees that if it enters into any contract, agreement or lease with any other air transportation operator or airline with respect to the Airport containing more favorable terms than this agreement, or if the Authority grants to any other air transport operator or airline, facilities, licenses or privileges with respect to the Airport which are more favorable than those accorded to Lessee, then the same terms, facilities, licenses and privileges upon the same terms and conditions will automatically and concurrently be made available to Lessee.

3. Excerpts from Plaintiffs' Exhibits 3 and 4

Request for Admission of Facts Under Rule 36—
Plaintiff's Exhibit 3

Plaintiffs hereby request the defendant within ten (10) days after service of this request to make the following admissions for purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

• • • • • • • • • •

22. Braniff International Airways, Inc. (Braniff) in 1955, pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board began scheduled international air services between Miami, Florida and various Latin American countries through the use of the Miami International Airport.

23. Reports of Braniff, Pan American and National to the Civil Aeronautics Board and published traffic reports of the Immigration Service for the 12 months ended June 30, 1959, indicating the international passenger departures from Miami to Latin America, show that the passenger traffic was carried as follows:

Pan American	64.1%	of all passengers
National	3.4%	of all passengers
Braniff	2.0%	of all passengers
All Foreign Carriers Combined	30.5%	of all passengers
	100.0%	

• • • • • • • • • •

Answers to Request for Admission of Facts Under Rule 36—Plaintiffs' Exhibit 4

• • • • • • • • • •

22.	Admitted
23.	Admitted

• • • • • • • • • •

4. Excerpts from Stipulated Exhibit 12-B

• • • • • • • • • •

[The Fiscal Year]
1958/1959

Name of Airline [U.S.]	No. of Landings [International]
1. P.A.A.	8,196
2. N.A.L.	907
3. Braniff	308

• • • • • • • • • •

5. Letter of General Counsel, Civil Aeronautics Board—Plaintiffs Exhibit 13

Civil Aeronautics Board—Plaintiff's Exhibit 13

CIVIL AERONAUTICS BOARD
Washington 25, D. C.

November 29, 1960

Philip Schleit, Esq.
Attorney at Law
1757 K Street, N.W.
Washington 6, D. C.

Re: Aerovias, et al. v. Bd. of Comm.
No. 8990-M; Cuba Aeropostal, S.A.
v. Bd. of Comm. No. 9820-M,
U.S. Dist. Ct. So. Dist. Fla.
(Miami Division)

Dear Sir:

This will acknowledge receipt of your letter of November 28, 1960, with respect to the above-captioned litigation, and requesting the opinion of the General Counsel of the Board with respect to certain questions concerning the operating rights and regulations applicable to international airlines. It is my understanding that it is proposed to submit these answers as part of the record in the litigation.

In the interest of simplicity, I am listing the questions as stated in your letter, together with the answer to each such question.

I. Do the foreign air carrier permits of each of the 13 foreign airlines shown in Annex A attached hereto authorize such foreign airline to:

a) Engage in scheduled foreign air transportation over the route or routes specified in the permit, also to engage in non-scheduled foreign air transportation over said route or routes?

Answer: Yes.

b) Engage in "air services" over said routes within the meaning of the various bilateral air transport services agreements?

Answer: Yes.

c) Engage in "scheduled international air services" over said routes within the meaning of articles 6 and 15 of the Convention on International Civil Aviation, known as the Chicago Convention (61 Stat. 1180)?

Answer: Yes.

d) Engage in "scheduled international air services" between the United States terminal point and a point or points, not named in the foreign air carrier permit, beyond the foreign carrier's homeland so long as such flights serve the foreign carrier's homeland in the case of all foreign airlines listed in Annex A (except TAN since September 18, 1960, in whose permit certain beyond services are prohibited)?

Answer: Yes.

II. In view of the fact that the C.A.B. and its staff have an important part in the development of bilateral air transport agreements, and that the C.A.B. has regulatory functions over both foreign and U. S. flag air carriers operating under these bilateral agreements, there are the following questions:

a) In the opinion of the General Counsel of the Board, is the Convention of International Civil Aviation (Commonly known as the Chicago Convention, 61 Stat. 1180) a treaty in full force and effect?

Answer: Yes.

b) In the opinion of the General Counsel of the Board, have all of the foreign airlines, listed in Annex A attached hereto (with the exception of the Guatemalan, Nicaraguan and Honduran airlines) been accorded by the United States the airline operating rights into the United States provided for in the Air Transport Services Agreements with their respective countries?

Answer: In accordance with the provisions of Section 1102 of the Civil Aeronautics Act of 1938, as amended, and Section 1102 of the Federal Aviation Act of 1958, the airline operating rights granted to the foreign airlines listed in Annex A (with the exception of the Guatemalan, Nicaraguan and Honduran airlines) have been granted consistently with the provisions of the Air Transport Services Agreements with their respective countries.

(c) In the opinion of the General Counsel of the Board, have three Central American Airlines (of Guatemala, Nicaragua and Honduras), wherein no bilateral air transport services agreements exist been accorded by the United States airline operating rights into the United States generally reciprocal to the airline operating rights accorded United States flag airlines in the respective foreign countries?

Answer: Upon the basis of the opinions and orders of the Board which issued foreign air carrier permits to the Guatemalan, Nicaraguan and Honduran airlines listed in Annex A, it is my opinion that the airline operating rights of those airlines have been granted by the United States for the purpose of granting rights reciprocal to those granted to United States carriers by the country of which the airline is a national.

III. As to Compania Cubana de Aviacion, S.A. ("Cubana"), do the records of the Board indicate that Cubana was controlled in whole or in part by Pan American World Airways, Inc., until about 1955?

Answer: In Havana-New York Air Carrier Permit Case, 14 C.A.B. 399 (1951), the Board found that Cubana was a wholly owned subsidiary of Pan American Airways from March, 1932, until November, 1945, at which time 48 percent of the stock was allocated for sale to Cuban nationals.

Pan American's holdings had been reduced to 48 percent by 1947, and to 42 percent at the time of the oral argument in the aforesaid proceeding. The Board's opinion in *Compania Cubana de Aviacion, Air Carrier Permit*, 20 C.A.B. 482 (1955), states that sale of the remaining shares of Pan American was completed in 1954 and that liquidation of that debt owed by Cubana to Pan American would be completed on March 10, 1955.

IV. Has it been generally customary for the past several years for international airlines carrying passengers to serve complimentary meals aloft to their passengers?

Answer: The international airlines who are members of the International Air Transport Association (approximately seventy in number) have entered into agreements, copies of which are on file with the Civil Aeronautics Board, which permit such airlines to serve complimentary meals aloft to their passengers in accordance with the requirements and limitations prescribed by such agreements. Most of the major international airlines of the world are members of the Association. To the best of my knowledge the Board has no official record of agreements or practices of international airlines who are not members of the Association.

Yours very truly,
Franklin M. Stone
General Counsel

by John H. Wanner
Deputy General Counsel

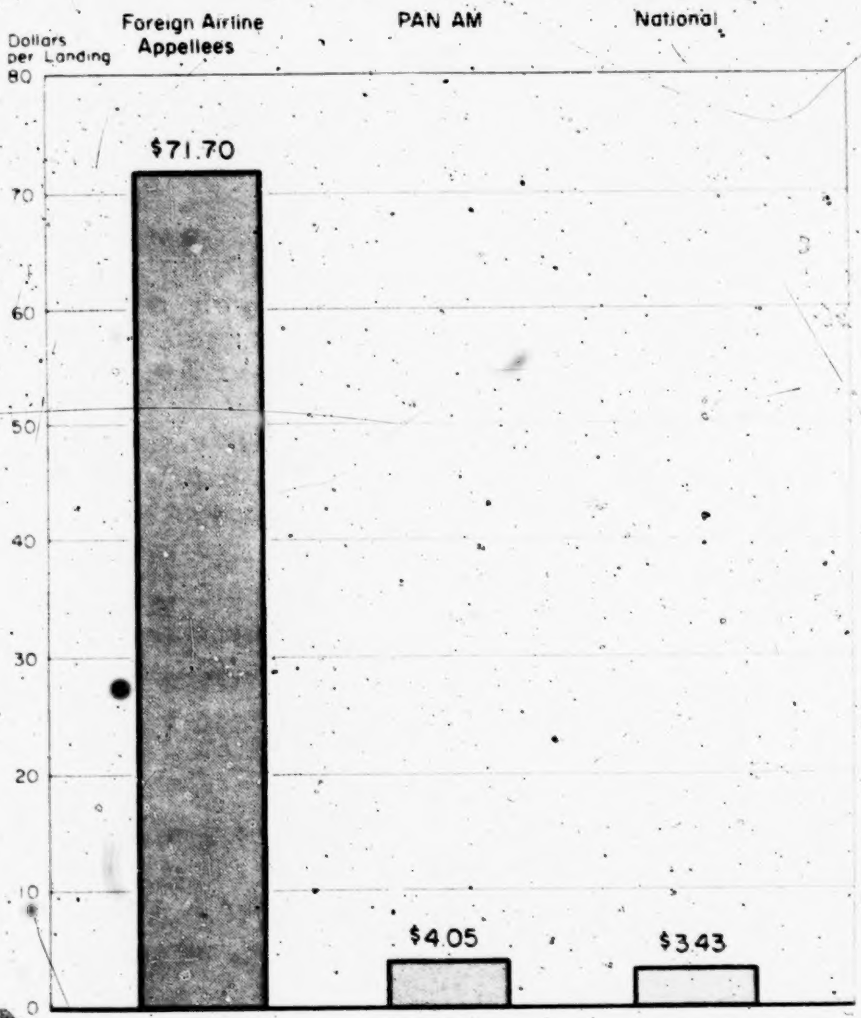
In the
United States Court of Appeals
For the Fifth Circuit

Case Nos 19,476
and 19,632
Page 3 of 4

EXHIBITS FOR ORAL ARGUMENT

Airport Charges for One Year Ending September 30, 1959

Comparison of Average Charge per Landing for Nine Appellees, then operating, and Pan Am and National



Source Stipulated exhibit 9 and 12; gas & oil concession charges, Plaintiffs Exhibits 15-17 (attached exhibits) Amounts include passenger, cargo, landing charges, and gas & oil concession charges Do not include catering charges Nine appellees paid total of $187,701.25 for 2,618 landings PAN AM paid $33,153.00 for 8,196 landings, and National paid $33,198.00 for 10,227 landings One appellee did not begin service until 1960 and one appellee has suspended

APPENDIX D

Part of Proceedings in Court Below

District Court Order, Exhibit I attached to Petitioners' Motion in the Court of Appeals, which Motion was entitled "Motion By Appellees To Include Certain Recent Dade County Port Authority Resolutions, Contracts and Facts As Part of The Record On Appeal."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 8990-M-Civil-EC

Aerovias Interamericanas de Panama, S.A.; Aerolineas Peruanas, S.A.; Compania Cubana de Aviacion, S.A.; Compania Ecuatoriana de Aviacion, S.A.; Empresa Guatemalteca de Aviacion; Empresa de Transportes Aerovias Brasil, S.A.; Expresso Aereo Inter-Americaño, S.A.; Guest Aerovias Mexico, S.A.; Lineas Aereas de Nicaragua, S.A.; Lloyd Aereo Colombiano; Rutas Aereas Nacionales, S.A.; and Transportes Aereo Nacionales, S.A.,

Plaintiffs

v.

Board of County Commissioners of Dade County, Florida, Acting as Dade County Port Authority,

Defendant

No. 9820-M-Civil-EC

Cuba Aeropostal, S.A.,

Plaintiff,

v.

Board of County Commissioners of Dade County, Florida, Acting as Dade County Port Authority,

Defendant

ORDER

THIS CAUSE came on before the Court upon Motion of the Plaintiffs-Appellees for the entry of an order designating certain resolutions and contracts of the defendant-appellant Port Authority occurring since decision herein and Final Decree as part of the record on appeal, and to modify the Stay Order; and after hearing argument of counsel for both parties and upon due deliberation, it appears to the Court:

Ordered that the motion to modify the Stay Order is referred to Judge Lieb.

That such documents would show the removal of all cargo terminal charges on all airlines since October 1, 1961, and new reduced rate airport charges for Braniff Airways, Inc., and certain other non-litigant foreign airlines as of January 1, 1962, granting also Braniff and the others equal future relief to that finally achieved by plaintiffs-appellees in this cause; that such matters would be relevant to the appeal only with respect to certain injunctive features; and they affect only the trial court's opinion under point 4 at page 244 of 197 F. Supp. 230 (1961), which contention of the defendant-appellant upon stipulation of all counsel in open court can not now be urged by defendant-appellant before the United States Circuit Court of Appeals; it is

ORDERED, that the motion be and it hereby is denied.

DONE AND ORDERED at Miami, Florida, this 20th day of February, 1962.

/s/ EMETT C. CHOATE
United States District Judge

APPENDIX E

Portions of Legislative History of Convention on International Civil Aviation, 61 Stat. 1180

State Department Memorandum for United States Delegates at Convention

Summary of Objectives Favored by the United States of America with Respect to Post-War Civil Air Transport

Confidential: For Information of the United States Delegates

II (2) Use of airports and Facilities on a Non-discriminatory basis

Policy Recommended:

That each country agree and take necessary implementary action:

(1) That the use of public airports, accessory facilities, and technical assistance such as navigational aids, weather reporting and telecommunications be made available to civil aircraft of the other on a basis of national and most-favored-nation treatment;

(2) That commercial aircraft of the other which have been granted rights of commercial entry or transit rights may have equality of opportunity to obtain or provide necessary facilities for fueling, repair or maintenance; and

(3) That the appropriate aeronautical authorities of each Government establish procedures for enforcing compliance with these provisions.

Background Material:

General. It is a well-established principle in international practice that the granting of commercial rights of entry (See Item 1, (2)) requires the according to the aircraft transport service of another country as favorable treatment with respect to use of public airport facilities as are accorded to aircraft of nationals of the country granting the operating rights. It is also considered that treatment on this basis is a necessary adjunct to the granting of the right of transit and technical stop. (See Item I (1).)

Situations have arisen where an air transport service of one country which has been granted commercial operating right into another country, has been estopped from effectively operating as a result of the efforts of national competitors to block access to existing fueling, maintenance or repair facilities and to prevent the providing of such facilities by the new carrier. The provisons in clauses (2) and (3) have been inserted with a view to assuring that the Government granting commercial operating rights to a foreign carrier will enforce equality of opportunity to obtain or provide accessory facilities vital to effective operation.

British Viewpoint

The British Draft Agenda does not include an identical item. However, attention is invited to Item 2 (9). The British position is probably indicated by the provisions in the international agreement cited below.

U. S. Viewpoint

It is believed that the treatment recommended in the policy declaration should be granted as a matter of course under international practice in connection with the granting of operating rights to American aircraft.

U. S.-British Agreements

The British and Canadian Governments are parties to the Paris Convention of 1919 which includes the following article:

> "Art. 24.—Every aerodrome in a contracting State, which upon payment of charges is open to public use

by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

"In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft."

The Air Navigation Arrangement between the United States and Great Britain, effective May 5, 1935, includes this British commitment:

"7. Aerodromes open to public air traffic in the territories to which this Note applies will, so far as they are under the control of His Majesty's Government in the United Kingdom, be open to United States aircraft, which (subject to the same proviso) will also be entitled to the assistance of the meteorological, wireless, lighting and day and night signalling services at such aerodromes. Subject again to the same proviso, the scale of charges at such aerodromes for landing and accommodation will be the same for United States as for British aircraft."

This applies only to the following territories:

United States territories:

Continental United States

Alaska

American Samoa (comprising the Island of Tutuila, the Manua Islands, and all other Islands of the Samoan group east of Longitude 171° west of Greenwich, together with Swains Island)

Puerto Rico (including Vieques, Culebra, Mona and Desecheo)

Virgin Islands of the United States (comprising St. Thomas, St. John, St. Croix and dependent islets)

British territories:

- United Kingdom of Great Britain and Northern Ireland
- Newfoundland including Labrador
- Bahamas
- Barbados
- Bermuda
- British Guiana
- British Honduras
- Jamaica (including Turks and Caicos Islands and the Cayman Islands)
- Leeward Islands and their dependencies including:
  - Antigua
  - Dominica
  - Montserrat
  - St. Christopher and Nevis
  - Virgin Islands
- Trinidad and Tobago
- Windward Islands and their dependencies including:
  - Grenada
  - St. Vincent
  - St. Lucia

STATEMENT OF MR. W. L. CLAYTON, ASSISTANT SECRETARY OF STATE, AT THE SENATE FOREIGN RELATIONS COMMITTEE HEARING, MONDAY, MARCH 19, 1945

At the outset, I would like to emphasize that the International Civil Aviation Convention which has been submitted to the Senate by the President is a document independent of all other agreements drawn up at the Chicago Air Conference and should be passed upon on its own merits.

The International Civil Aviation Convention sets forth modernized basic regulations governing international civil aviation. It covers the air transport, air navigation and technical phases of aviation, and establishes a basis for common air practice throughout the world. It sets up an International Civil Aviation Organization on a truly world wide basis. This body consists of an assembly representing all States parties to the Convention, as well as a 21-member Council, which will have advisory and technical functions, but which is not empowered to regulate the economic aspects of international air transportation.

The fundamental improvement which the Chicago Aviation Convention makes is the replacement of the international aviation convention adopted at Paris in 1919 and the international aviation convention adopted at Habana in 1928 by a single modernized convention. This makes it possible to bring about the adoption and application of international rules and standards on a more universal basis than has heretofore been accomplished. In view of the increasing speed of aircraft and their ability to fly over the territories of many countries in a single flight, international air navigation can be greatly impeded by divergencies between the rules and standards of flight arising out of different international convention. Furthermore, the experience of the last few years has emphasized the importance of bringing air navigation regulations up to date.

In connection with the foregoing, particular attention is invited to the situation that has existed in the Western Hemisphere. International aviation in Canada and in European possessions of the Western Hemisphere was governed by the principles of the Paris Convention. The United States, Mexico, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Dominican Republic, Haiti, Ecuador, and Chile are parties to the Habana Convention, but are not parties to the Paris Convention. Peru, Paraguay, Uruguay and Argentina are not parties to the Habana Convention, but are parties to the Paris Convention. Since in some of the countries of the Western Hemisphere there have been no rules governing international air navigation other than those included in national laws, while in other countries of this Hemisphere either the Paris or Habana Convention was applicable, there were marked divergencies in the international regulation of aviation. While these conditions were perhaps endurable in the pioneering days of aviation, before the war, they would be unendurable with the vastly increased traffic anticipated in the post-war era.

The delegates to the Chicago Aviation Conference were in a position to profit by the experience gained in the practical application of the Paris and Habana Conventions, and retained in the Chicago Convention a number of the basic principles of the Paris and Habana Conventions which, in their practical application, had satisfactorily met the needs of international air navigation. At this stage, I should like to give a general outline of outstanding differences between the Chicago Convention and the existing multilateral aviation conventions.

The provisions of the Paris and Habana Conventions setting forth the conditions under which commercial and non-commercial aircraft of a contracting State would be allowed to operate in territory of other contracting States were not at all clear. Although the Paris Convention provided that the operation of scheduled air services of any contracting State over territory of another contracting State would be subject to the latter's prior consent, the provisions of the Convention relied upon to establish a general right of entry for private or tourist flights or for occasional charter flights were rather ambiguous since the provision of the Convention mainly relied upon to establish this general right of entry was the one granting the right of innocent passage, a term which many have confused with the establishment of a general right of transit for commercial air lines. Moreover, a provision in another part of the Paris Convention under which each contracting State granted to aircraft of other contracting States the right to fly in transit through its territory was also relied upon to establish the general right of transit for non-scheduled services.

The Habana Convention grants the right of innocent passage in one article and states in another article that the aircraft of a contracting State engaged in international air commerce shall be allowed to discharge passengers and cargo of foreign origin in another contacting State and take on passengers and cargo in such other State for a foreign destination, but the Convention does not specifically state that the operation of scheduled air lines of one contracting State in territory of another shall be subject to the latter's prior authorization. In practice, however, the Habana Convention has been interpreted as requiring such prior authorization.

Having in mind these ambiguities of the Paris and Habana Conventions, the delegates at the Chicago Aviation Conference clarified the situation by definitely providing in Article 5 that aircraft of a contracting State not engaged in scheduled international air services shall have the definite right of entry into or transit through the territory of other contracting States subject to certain reasonable limitations and conditions which are fully explained in Article 5. As to the entry of international scheduled lines the Chicago Convention leaves no doubt as to what the delegates to the Chicago Conference had in mind, since Article 6 is very specific and definitely provides that no scheduled international air service may be operated over or into the territory of a contracting State except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Part I of the Chicago Convention contains general principles pertaining to air navigation. A number of these are basically the same as corresponding provisions found in the Paris and Habana Conventions, but they have been modernized in the light of the practical operating experience of the last few years.

Part II of the Chicago Convention provides for the establishment of the International Civil Aviation Organization. Part II contains a number of provisions not found in the Paris Convention of 1919, since that part defines the duties of a Council and an Assembly which are to constitute the International Civil Aviation Organization, whereas the Paris Convention established a single body known as the International Commission for Air Navigation which had important duties in the matter of developing international regulations on various technical subjects. The advantage in having the International Civil Aviation Organization under the Chicago Convention comprised of both a Council and an Assembly is that representation in the Assembly of all the contracting States is provided for, while the Council, a smaller body composed of States elected on the basis of their importance in international air transport or contribution of air navigation facilities, or elected because of geographical position, is in a better position to act expeditiously.

The International Commission for Air Navigation adopted technical regulations which were embodied in the annexes to the Paris Convention, and it was provided in that Convention that these regulations would become effective upon their notification to the contracting States. The Chicago Convention deals with the matter in a somewhat different way since under this Convention the Council will adopt international standards and recommended practices, which will come into force as such unless disapproved by a majority of the contracting States. While it is generally agreed that the various countries should adopt and apply these international standards in their national regulations to the greatest possible extent, there is the possibility under the Chicago Convention of some departure from the international standards if a particular government feels that it has serious reasons for such departure.

The Convention further provides that the Council shall establish an air navigation commission composed of qualified and experienced persons charged with the duty of making studies of technical aviation operational matters and that the findings of this commission are to be submitted to the Council for adoption. Among the matters referred to here would be such questions as radio communication procedures, air navigation aids, rules of the air, air traffic control, airworthiness of aircraft and aeronautical meteorology. The great advantage of such a centralized study of these questions on a world-wide basis will be apparent. The fast increasing number, size and speed of aircraft using the air space makes it more and more necessary to simplify, improve and standardize air navigation procedures.

The Convention permits a country which finds it impossible or inadvisable to conform to the practices recommended by the Council to deviate from those practices, provided the Council is given seasonable notice of such deviations so that other countries may be informed thereof.

A fundamental weakness in the Habana Convention is that it provided for no international aeronautical body to develop international standards in the technical field of aviation.

Part III of the Chicago Convention deals with international air transport. This part contains important provisions conferring upon the Council the power to assist the contracting States in the matter of making available in the territory of a contracting State adequate airports and facilities for the safe, regular, efficient and economical operation of international air services of the other contracting States.

The Convention provides that all agreements relating to international air transportation shall be filed with the Council and that full publicity be given thereto. We believe that this is an important provision in that it ends the era of secret diplomacy in international air transport.

This Convention, Gentlemen, is literally a "constitution" for the postwar air world, and a framework under which international aviation can thrive and grow strong. It establishes common practices throughout the world so that any aircraft can fly from any airport to any other airport on any continent, following rules, regulations and practices which are universal in their application. It provides the necessary machinery in anticipation of a vastly intensified tempo of postwar world aviation activity.

DEPARTMENT OF STATE
WASHINGTON

In reply refer to L/T

November 29, 1962

Dear Mr. Schleit:

In your letter of November 6, 1962 you request an opinion of the Department of State whether the Convention on International Civil Aviation, (61 Stat. 1180), particularly Article 15 thereof, is considered to be self-executing, or whether the Department considers that implementation by the Executive or by the Legislative branch of the Government was necessary to make Article 15 fully effective.

You state that this request is made for the purpose of clarifying certain confusion which you consider has arisen in the United States courts on the foregoing point and refer to *Arcorias et al v. Board of County Commissioners*, 197 F. 2d 230 (District Court Opinion), and a Court of Appeals opinion in the same case of August 31, 1962.

A survey of the records of the Department of State regarding this Convention indicates that the question whether Article 15 of the Convention is self-executing has not been raised heretofore. The Department has, from all indications in its records, proceeded on the basis that since the entry into force of the Convention on April 4, 1947 Article 15 has been in full force and operative without the enactment of any additional legislation or implementation by the Executive.

In accordance with its policy of not issuing legal opinions at the request of a private party with respect to a matter which is *sub judice* the Department regrets that it is unable to comply with your request. If requested by a court which is seized of the issue, however, the Department would be glad to express its opinion as to the present effect of Article 15 of the Convention.

Sincerely yours,

RICHARD D. KEARNEY
Deputy Legal Adviser

Mr. Philip Schleit,
Attorney at Law,
1757 K Street, N.W.,
Washington 6, D. C.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 627.

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., *et al.*,

and

LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION.

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INDEX.

PAGE

RESTATEMENT OF QUESTIONS PRESENTED 1

STATEMENT 3

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT 3

Petitioners seek special exemption from the uniform application of classifications in respect of airport charges that were established in 1946, which have been uniformly applied by the Authority since that time 3

The only question is whether the Chicago Convention requires that foreign aircraft be accorded special treatment that is unavailable to American aircraft 7

Relief was not claimed or granted by the District Court on a theory that the Resolution 56 charges are unreasonable or that the Authority's contracts with the sustaining airlines are illegal 9

Relief was not claimed or granted by the District Court on a theory of unjust discrimination 11

The Court of Appeals properly interpreted Article 15 as requiring that airport charges assessed against foreign aircraft for the use of the airport should not be higher than those assessed against United States aircraft similarly situated 14

The Court of Appeals properly interpreted the Chicago Convention consistently with laws of the United States 21

CONCLUSION 23

TABLE OF AUTHORITIES.

Cases.

PAGE

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U. S. 522 22

Asakura v. *Seattle*, 265 U. S. 332 16

Baker v. *Carr*, 369 U. S. 186 21

Barcardi Corp. v. *Domenech*, 311 U. S. 150 .... 16, 18, 19

Clark v. *Allen*, 331 U. S. 503 16

Interstate Commerce Commission v. *United States*, 289 U. S. 385 13

Nielsen v. *Johnson*, 279 U. S. 47 16

Regina Cargo Airlines, Inc., et al. v. *Board of County Commissioners of Dade County, Florida*, No. 18,133, U. S. Court of Appeals for the Fifth Circuit 8

Reid v. *Covert*, 354 U. S. 1 21

Todok v. *Union State Bank*, 281 U. S. 449 17

Trans World Airlines, Inc. v. *City and County of San Francisco* (9th Cir., 1955), 228 F. 2d 473, *cert. den.*, 351 U. S. 919 11

United States v. *Lee Yen Tai*, 185 U. S. 213 23

United States v. *St. Louis Terminal*, 224 U. S. 383 10

Whitney v. *Robertson*, 124 U. S. 190 .... 21, 23

Other Authorities.

Act of March 18, 1950, 16 U. S. C. §7d 23

Civil Aeronautics Act of 1938, 52 Stat. 993, as amended, Tit. 49 U. S. C. §1374(b) 22

Federal Airport Act of 1946, 60 Stat. 176, Title 49 U. S. C., §1110(1) 13, 22

Hearings on Executive A before the Committee on Foreign Relations, United States Senate, 79th Cong., 1st and 2nd Sess., *passim* **22**

Rule 23(1)(c) **17**

Surplus Property Act of 1944, 50 App. U. S. C. §1622(g)(2)(B) **23**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 627.

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., *et al.*,

and

LINEAS AEREAS DE NICARAGUA, S.A.,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA,
acting as the DADE COUNTY PORT AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION.

Restatement of Questions Presented.

Review of the decision of the Court of Appeals could present but one question:

> **Whether Article 15 of the Chicago Convention imposes on the Dade County Port Authority an absolute obligation to charge foreign aircraft using Miami International Airport only the lowest rates paid by American aircraft engaged in international air services, regardless of reasonable classifications in respect of aircraft**

charges, which are applied uniformly by the Authority to all aircraft alike, without distinction as to nationality.

That this was the question considered and determined by the Court of Appeals clearly appears from that court's opinion:

> "The District Court construed this article [Article 15] in a favored nation clause concept, but refused to consider it on the basis of determining the presence or absence of discrimination. It was treated as being an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances. We disagree and reverse."
>
> Petitioners' Appendix, p. 3a.

Petitioners have made no effort to present this fundamental question or to demonstrate that Article 15 has the effect attributed to it by the District Court and rejected by the Court of Appeals. Instead, Petitioners assume that the Convention does absolutely grant foreign aircraft a right not to be charged rates higher than the lowest rate charged any American aircraft, "no matter what the classification or circumstances," and ask rhetorically whether Article 15, having that assumed effect, is rendered "ineffective" by Article 82 of the Convention (Question 1), and whether their assumed "rights" may be "nullified or avoided" by the effect of other considerations (Questions 2 and 3). Petitioners also ask the Court (Question 4) to decide whether certain bilateral agreements, entered into by the President of the United States and the executives of other signatories of the Chicago Convention pursuant to authority granted by the treaty and in the form annexed to the treaty, secure to petitioners rights greater than those secured by the Convention itself.

Review of the questions posed by petitioners would be inappropriate, for those questions are not involved in the case at all. In phrasing their first three questions, petitioners have simply distorted some of the collateral reasons given by the Court of Appeals in holding that petitioners' assumed "right" under Article 15 does not exist. And the fourth question raised by petitioners asserts an argument that is not only new and unfounded but also conflicts with petitioners' repeated contentions that the executive agreements have the same effect bilaterally as the Chicago Convention has multilaterally.

Statement.

Respondent adopts the opinion of the Court of Appeals as containing a substantially accurate statement of the facts essential to this Court's consideration of whether petitioners have demonstrated genuine reasons for granting the review sought, and whether those reasons are special and important.

Argument in Opposition to Granting the Writ.

Petitioners seek special exemption from the uniform application of classifications in respect of airport charges that were established in 1946, which have been uniformly applied by the Authority since that time.

In 1945 and 1946, when the Board of County Commissioners undertook to establish a public airport in Dade County, the airlines upon whose patronage the success of the venture depended fell into two classifications: those who, at the outset, "joined with [the Board, acting in its statutory capacity as Port Authority] to establish and sustain the airport in its infancy," and those who did not (Opinion of Court of Appeals, Petitioners' App. pp. 12a-13a).

The sustaining airlines[1] are those that executed 20-year leases and thereby committed themselves to use the airport and to sustain it in any losses for as long as the Authority desired to be so sustained. In turn, those airlines were guaranteed a share of any profits made by the airport as well as a favorable schedule of airport charges (R. 632-36). Because of the immediate financial success of the airport, the Authority elected on July 1, 1947 to terminate the profit-and-loss-sharing arrangement (R. 644, 660). The airport charges contracted for by the sustaining airlines will subsist until January, 1966 (R. 641, 671).

The prototype contract was an inseparable part of a transaction by which Pan American World Airways, Inc., transferred to the Authority the existing 36th Street Airport and cash in exchange for the Authority's 20-year bonds, payable solely from the Airport's anticipated revenues (R. 629, 640, 643, 656, 662). An identical contract was entered with Eastern Air Lines, Inc., from whom the Authority borrowed money with which it purchased adjoining airport property from the United States (R. 656, 663; Stip. Exh. 18, p. 16).

Such contracts were offered also at large to other airlines that were willing at the outset to identify their financial interests with those of the airport (R. 669). Two other United States airlines—National Air Lines, Inc., and Delta C & S Air Lines, Inc.—and one foreign airline—TACA Airways of the Republic of El Salvador—accepted lease contracts identical to those accepted by Pan American and Eastern (R. 629-30).

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[1] So designated by the Administrator of Civil Aeronautics (R. 668).

All airlines other than sustaining airlines were charged according to a different schedule of airport charges. That schedule was first announced on March 18, 1946, a few days before the airport opened (R. 648-49). One month later, landing charges applicable to those airlines were in some respects reduced (R. 651). On September 24, 1946,[2] the Authority adopted Resolution 56, which again reduced those charges and made them applicable prospectively to all users of the airport

> "except aircraft of lessees whose charges have been established by contract prior to the adoption of this Resolution." (R. 652.)

The charges established by Resolution 56, which have been and are paid by the vast majority of foreign and domestic airlines using the airport, are the charges of which petitioners complain.

It is not true that Resolution 56 established charges "for all airlines other than the Big Four" (Petition, p. 15). It established charges applicable to all airlines, regardless of size, supposed "importance," nationality or any other irrelevant consideration, other than those with whom the Authority previously became mutually bound because the young airport needed the security thereby afforded. There were five such airlines, not "Four," and one of them—TACA Airlines of El Salvador—can hardly be termed "Big." In the context of this case, the term "Big Four" is meaningless as a description,[3] but petitioners have found its use convenient as a way of ignoring TACA's existence and suggesting that the Authority's sustaining airlines have in common "sheer bigness and power" and "vast and extensive tentacles" (Complaint to CAB, R. 676).

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[2] The statement in the lower court's opinion that Resolution 56 was adopted "on September 24, 1956" (Petitioners' App., p. 5a, 307 F. 2d 804) is a typographical error. The court understood clearly that the Resolution was adopted on September 24, 1946, as is shown by its next statement, that "Appellees commenced using the facilities thereafter, one as early as 1948."

The classifications thus established have been uniformly applied by the Authority since 1946. One of the original plaintiffs, Cubana de Aviacion, S. A., began service to Miami on April 15, 1946 (R. 682), but did not become a sustaining airline. Instead, Cubana sought the rights of a sustaining airline (and none of the attendant responsibilities) on the ground that, as Pan American's subsidiary, it was *ipso facto* entitled to the benefit of Pan American's contract (R. 664). That application was denied, as were the later applications of petitioners and all other foreign and domestic airlines (including Braniff International Airways, a United States airline operating internationally) that entered the airport after September, 1946 and, on one ground or another, sought exemption from the existing classifications (R. 664).

As will be seen, the experience of Braniff International Airways is of evidentiary value in determining, for the purposes of Article 15, what charges "would be paid by [United States] national aircraft" owned by international airlines who are otherwise situated as petitioners are situated. Petitioners seek improperly to imply (Petition, pp. 33, 34) that the Authority, by recently reducing Braniff's airport charges, has exempted Braniff from the uniform application of Resolution 56. That implication is false. Petitioners well know that the recent reductions were offered generally to all airlines serving the airport, including petitioners,[4] as a good faith attempt by the Authority to compromise and settle various disputes in respect to those charges. Some airlines accepted the proposal, but it appears that petitioners are more interested in reviving the unfounded $748,600 judgment of the District Court than they are in a prospective reduction of airport charges. The recent adjustment in rates, made in compromise settlement of disputes, does not add stature to petitioners' argument.

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[3] Of the four, only Pan American is "big" internationally. National carried only 3% of the Miami international traffic when it served Cuba (compared to Braniff, who petitioners say is "comparatively small" in carrying 2% of such traffic, Petition, p. 14), and it has since discontinued that service. Eastern and Delta do not operate internationally from Miami.

The only question is whether the Chicago Convention requires that foreign aircraft be accorded special treatment that is unavailable to American aircraft.

Because petitioners have devoted themselves to presenting and discussing academic questions that do not bear on the basic issue, it is necessary that the sole question involved be clearly identified.

By Article 15 of the Chicago Convention, the United States undertook to assure that airport charges for foreign aircraft "shall not be higher . . . than those that would be paid by its national aircraft engaged in similar international air services" (R. 686). The crux of the matter, therefore, is what charges "would be paid" by such national aircraft of the United States.

Petitioners have assumed in each court below, and they assume here, that Article 15 will be and ought to be read as though it specifically provides that charges for foreign aircraft shall not be higher than "the rates charged United

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[4] To the Court of Appeals, we stated: "The Commissioners have been and are willing to compromise the disputes involved in pending litigation on the same basis by entering into similar contracts with the litigating airlines, and hereby offer so to do." (R. 724-25.)

States national aircraft (*such as Pan Am*)" (Petition, p. 24, emphasis added). The assumption is a violent one, and it should not be relegated to parenthetical importance.

The District Court adopted petitioners' theory and held that the "mandatory language" (R. 399) of Article 15 constitutes an "absolute command" (R. 401) that foreign aircraft not be charged higher rates than those "imposed upon Pan Am and National" (R. 426). This theory, which was "the only legal theory upon which this cause was permitted to proceed" by the District Court (R. 382), has the effect of exempting petitioners, simply because they are foreigners operating aircraft of foreign registry, from the effect of classifications that remain applicable to all United States airlines and aircraft, irrespective of whether they operate domestic or international air services. The discriminatory effect of the District Court's interpretation of Article 15 was exactly as stated by Philip Schleit, Esq., petitioners' counsel here, in his brief for appellants upon the appeals of three United States airlines from the District Court's refusal to hold the classifications themselves to be unreasonable:

> "Hence, if the foreign airlines prevail as a class, there will be but a comparative handful of United States airlines at the Miami International Airport left to pay the higher airport charges. This would leave the United States airline Appellants and other United States airlines in a small group of high-paying carriers. This, in itself, would operate as 'unjust discrimination.'"
>
> Brief for Appellants, p. 14.[5]

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[5] *Regina Cargo Airlines, Inc., et al. v. Board of County Commissioners of Dade County, Florida*, No. 18,133, U. S. Court of Appeals for the Fifth Circuit. The appeals were dismissed on appellants' motion before oral argument (see certified copy of that court's order dated March 8, 1960).

The decision of the Court of Appeals in the instant case was that the District Court had improperly interpreted Article 15 (Petitioners' App., p. 3a). Finding that petitioners "have at all times been afforded uniform conditions" and that charges paid by foreign aircraft were not higher than those paid by American aircraft "of the same class for the purpose of charges" (Petitioners' App., p. 10a), the Court of Appeals concluded that Article 15 does not constitute

> "an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances."
>
> Petitioners' Appendix, p. 3a.

This question of law is the only question that would be presented on review of the lower court's decision.

Relief was not claimed or granted by the District Court on a theory that the Resolution 56 charges are unreasonable or that the Authority's contracts with the sustaining airlines are illegal.

Petitioners' Fifth Amended Complaint, upon which the District Court granted relief, made no claim that the Resolution 56 rates are unreasonable. Agreeably to the "only legal theory on which this cause was permitted to proceed" by the District Court (R. 382), petitioners stipulated that the reasonableness of those charges is not in issue (R. 631) and pleaded only that the charges applicable to them are higher than those paid by Pan American and National (R. 155). The District Court, at petitioners', behest, declared:

> "[T]he test is not the 'reasonableness' of the charges imposed but that the charges 'shall be no higher than' according to the provisions under consideration." (R. 400.)

It is therefore irrelevant as well as misleading for petitioners to suggest that the rates are unreasonable in the extreme and that they pay an "average charge per aircraft landing" that is "1800% higher than that for the Big Four" (Petition, p. 15). Petitioners' exaggerated comparison is based principally on the fact that the schedule applicable to sustaining airlines as well as the schedule applicable to all other airlines provides for smaller charges per landing as the number of landings increases in each monthly period (R. 632-33, 653). Obviously, the "average charge per aircraft" for any airline operating numerous flights would be lower than the "average charge per aircraft" paid by airlines having few landings. That would be true regardless of the schedule applied, whether the sliding scale applied is that of Resolution 56 or that of the lease contracts.

The reasonableness of the contract rates and of the Resolution 56 rates is therefore not an issue in the case. In a proceeding in which the reasonableness of the Resolution 56 charges *was* put in issue by petitioners, the Administrator of Civil Aeronautics held that "such rates and charges are fair and reasonable" and that they "compare favorably with the rates and charges now being imposed at other comparable airports" (R. 668, 669).

Nor does this case involve the application of the Sherman Act, as interpreted by this Court in *United States* v. *St. Louis Terminal*, 224 U. S. 383, relied on by petitioners (Petition, p. 47), or of the Robinson-Patman Act, relied on by petitioners in the Court of Appeals (Brief for Cross-Appellants, p. 9). Neither does the case involve the legality of the Authority's contracts with the sustaining airlines. The Fifth Amended Complaint (R. 148) made no attack on the Authority's contractual obligations to the sustaining airlines. The sustaining airlines have never been made parties to this proceeding. Their contracts are and must be regarded as valid and subsisting. *Trans World Airlines, Inc.* v. *City and County of San Francisco* (9th Cir., 1955), 228 F. 2d 473, *cert. den.*, 351 U. S. 919. Petitioners urged in the Court of Appeals that the District Court erred in failing

> "to enjoin the use of a sliding scale of landing charges granting volume discounts to large United States airlines not based on cost differentials . . . ." (R. 479.)

but they now disclaim any intention to question the legality of the Authority's contracts with the sustaining airlines, and deny ever having made such a claim (Petition, p. 38, n. 18).

Relief was not claimed or granted by the District Court on a theory of unjust discrimination.

Claims of unjust discrimination against nonsustaining airlines were made by petitioners' original Complaint in the District Court and were based on the Federal Airport Act and the Surplus Property Act (R. 10, 11). But that complaint and petitioners' later pleadings raising that issue were dismissed by the District Court, together with the similar claims of four United States airlines based on unjust discrimination (R. 381). On their cross-appeal to the Court of Appeals, petitioners made no point of the District Court's dismissal of those pleadings, and relied exclusively on the theory adopted by the District Court.

The Complaint on which the decree of the District Court was based (R. 148) does not allege that the classification by which sustaining airlines are distinguished from all other airlines was unreasonable in 1946 or at any time thereafter. That pleading seeks relief for a class of foreign airlines, not for a class of nonsustaining airlines. The decision of the District Court was that the Chicago Convention guarantees certain treatment to foreigners and that, because the Convention does not "employ the term 'just'" or "speak of discrimination" (R. 400), it is blind to all classifications based on other considerations.

On petitioners' motion (R. 171), the District Court struck (R. 174) from the Authority's Answer the allegations (R. 168) by which the Authority sought to demonstrate the reasonableness of the classifications giving rise to different airport charges for sustaining airlines and for all others.

It therefore is inappropriate for petitioners to argue that there was no basis for a distinction between sustaining airlines and all others, because the sustaining airlines allegedly "furnished no valuable consideration" for their contracts (Petition, p. 38). That unfounded contention[6] is but another attempt by petitioners to draw attention from the "only legal theory on which this cause was permitted to proceed" in the District Court (R. 382). Similarly, petitioners irrelevantly argue that they were not given an opportunity after September 1946 to "sign leases or contracts" like those held by sustaining airlines (Petition, pp. 41-42). Neither was any other nonsustaining airline. The implication in petitioners' presentation, that nonsustaining airlines were unjustly discriminated against as a class, is irrelevant as well as untrue. A trial on contentions of unjust discrimination would involve issues and evidence materially different from those submitted by petitioners to the District Court. See, *e.g.*, ***Interstate Commerce Commission* v. *United States***, 289 U. S. 385.

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[6] Petitioners' suggestion (Petition, pp. 40-41) that nonsustaining airlines would somehow "have been required" by the Authority to bear the airport's deficits is a new contention, made for the first time to this Court. Only those airlines that contracted to pay assessments for that purpose (R. 637) could have been obligated to do so. Petitioners speculate that nonsustaining airlines could have been required to pay "increased landing charges" in the year following that in which the deficit occurred (Petition, p. 41). Aside from the fact that there is no evidence that the Authority ever conceived of it, that plan could not have required contribution by nonsustaining airlines "ratably in accordance with the number of flights scheduled to land during the fiscal year in which deficit occurred" (R. 637). In fact, the Authority could not have required that such airlines land any aircraft "in the second year" (Petition, p. 38).

When certain petitioners and certain United States airlines complained to the Administrator of Civil Aeronautics that the classifications in respect of charges were unreasonable and constituted an unjust discrimination against non-sustaining airlines (A. 37), within the proscription of the Federal Airport Act of 1946, the Administrator held that such was not the case:

> "... it is our opinion that, inasmuch as the fees and charges imposed against the sustaining airlines in the 1945 agreements are considered to have been reasonable in the light of the circumstances prevailing at the time of execution of such agreements, and as the fees and charges now being imposed against all other carriers (including the head tax and cargo tax and the charges imposed against the suppliers of such carriers) are considered reasonable in the light of all circumstances now prevailing, the Port Authority cannot be said to be unjustly discriminating against the latter group of carriers." (R. 670.)

The Administrator explained his decision as follows:

> "In reaching this conclusion we have taken into consideration, among other things, (1) the provision in each of the agreements which, in effect, constituted an underwriting of the bonds then being issued by the Port Authority to finance the acquisition from Pan American Airways of the Miami airport; (2) the fact that in order to market the bonds it was necessary at that time for the Authority to provide

> some type of security other than the then anticipated but unknown revenues, such as was provided in the underwriting of the bond issue by the sustaining airlines; (3) the fact that the schedule of landing fees and charges prescribed in the original lease agreements with the sustaining airlines compares favorably with landing fees and charges at other comparable airports in effect at that time; (4) the fact that similar agreements were offered to all other carriers then operating on the Miami International Airport; and (5) the fact that it was not unusual in 1945 for an airport owner to enter into agreements with airlines providing for the leasing of space on the airport and the use of the landing facilities at prescribed rentals and landing fees and charges, for terms of 15, 20 and 25 years. Further, it is our view that the Dade County Port Authority had adequate authority under applicable law to enter into agreements such as those entered into with the sustaining airlines." (R. 669.)

The Court of Appeals properly interpreted Article 15 as requiring that airport charges assessed against foreign aircraft for the use of the airport should not be higher than those assessed against United States aircraft similarly situated.

The Court of Appeals found that petitioners and other foreign airlines had been afforded the same "uniform conditions" upon which the airport was made available for use by all other aircraft and properly concluded that Article 15 of the Chicago Convention requires only that charges for foreign aircraft be not higher than those that "would be paid" by national aircraft "of the same class for the purpose of charges" (Petitioners' Appendix, p. 10a). The aircraft of petitioners are of the same class, for the purpose of charges, with all aircraft, of any nationality and in any kind of service, domestic or international, "except aircraft of lessees whose charges have been established by contract prior to the adoption" of Resolution 56 (R. 652).

In their original Complaint petitioners alleged that they occupy "a similar position" with all other foreign and domestic airlines except the sustaining airlines (R. 16). And certain petitioners and certain other foreign airlines claimed to the Administrator of Civil Aeronautics that they were "similarly situated" with the four United States airlines who joined in their complaint and with other airlines not parties to that complaint (R. 667). Those statements are obviously true. It cannot reasonably be supposed that the United States, by subscribing to the Chicago Convention, intended to require that airports within its jurisdiction must thereafter give special and discriminatory preference to foreign airlines, simply because they are foreigners.

There is no shred of proof in the record that the Authority has ever discriminated against an aircraft because of its nationality. The charges that "would be paid" by foreign aircraft or airlines not having lease contracts prior to September, 1946, is shown by the fact that TACA Airways, of El Salvador, made timely application for and was granted the rights and responsibilities of a sustaining airline. The charges that "would be paid" by an internationally operating United States airline not a sustaining airline is shown by the fact that Braniff International Airways applied in 1955 for special exemption from the Resolution 56 rates, and the Authority rejected its application. The case ends there.

The Chicago Convention had the expressed purpose of assisting the development of international aviation "on the basis of equality of opportunity" (R. 686). Even petitioners rely on authority that foreign aircraft are due "the same treatment as accorded" national aircraft (Petition, p. 29). The Court of Appeals rightly held that the contracting States sought to abolish any "distinction as to nationality" (Petitioners' App., p. 9a). In the name of those principles, the District Court arbitrarily exempted foreign airlines from the uniform operation of Resolution 56, so as to create a palpably unjust discrimination in favor of petitioners and against those United States airlines, who, like petitioners, never bore the responsibilities of sustaining airlines. It was the District Court, and not the Authority, that sought to create an arbitrary distinction based on nationality. The District Court's decision to do so was properly reversed.

The decision of the Court of Appeals is therefore in complete harmony with the decisions of this Court principally relied on by petitioners (Petition, p. 38): *Asakura* v. *Seattle*, 265 U. S. 332, 340, in which the Court dealt with a treaty guaranteeing Japanese liberty in the United States to "carry on trade . . . upon the same terms as native citizens . . . , submitting themselves to the laws and regulations there established"; *Nielsen* v. *Johnson*, 279 U. S. 47, 51, in which the Court held, in respect to the offending Iowa statute,

> "That there is a discrimination based on alienage is evident. . . ."
>
> 279 U. S. at 51;

Barcardi Corp. v. *Domenech*, 311 U. S. 150, 155, in which a "glaring discrimination" against foreign trade marks, apparently aimed "so as to exclude only the plaintiff," was struck down by the Court; and *Clark* v. *Allen*, 331 U. S. 503, in which the Court gave effect to a treaty overcoming discriminatory legislation against foreign heirs and devisees.

The construction placed on the Chicago Convention by the Court of Appeals is also in complete harmony with this Court's decision in *Todok* v. *Union State Bank*, 281 U. S. 449, in which the Court rejected as "repugnant to the purpose of the treaty" a construction of a treaty that "would appear to place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the state." The Court held that "it is not to be supposed" that the treaty was intended to secure for aliens arbitrary exemption from "reasonable requirements . . . imposed upon both aliens and citizens without discrimination." 281 U. S. at 454, 455.

The four "questions" presented by petitioners (Petition, pp. 2, 3) in some ways resemble certain collateral reasons given by the Court of Appeals for its basic decision. But petitioners, instead of expressing these collateral matters "in the terms and circumstances of the case," as required by this Court's Rule 23(1)(c), have distorted the lower Court's reasoning almost beyond recognition.

First Question: The Authority insists, and the Court of Appeals agreed, that the application of reasonable classifications to all airlines and to all aircraft, irrespective of nationality, is not a practice inconsistent with Article 15 of the Chicago Convention. The Court referred to the Authority's contracts with sustaining airlines as "infraterritorial inconsistencies" (Petitioners' App., p. 11a) and held that such "inconsistencies" were not forbidden by Article 15. The Court simply held that any attempt to remove all reasonable classifications, so that every aircraft would be charged "equally" with every other aircraft, regardless of circumstances, is necessarily a political and not a judicial responsibility under Article 82. It should be noted that the Authority in 1957 assured the Administrator of Civil Aeronautics, in effect, that the "inconsistent" provisions of the sustaining airlines' contracts would be "terminated as soon as such action can lawfully be taken," to-wit: when they expire by their own terms in December, 1965 (R. 671).

The Court did not, as claimed, commit "a shocking perversion of language" or otherwise justify petitioners' lengthy attack (Petition, pp. 23-30) on this portion of its opinion. Certainly, the Court of Appeals did not hold that the Convention was not "self-executing" (Petition, p. 27); the Court did not even discuss that academic question, holding as it did that in any event the treaty did not have the particular "self-executing" effect claimed by petitioners.

Second Question: In determining what charges "would be paid" by United States aircraft "of the same class for the purpose of charges" (Petitioners' App., 10a), the Court of Appeals quite properly recognized that Braniff International Airways pays the Resolution 56 rates, is the only United States airline other than Pan American now operating internationally and is the only international United States airline "of the same class" with petitioners. Petitioners' second point is that this fact should be ignored by the Court (Petition, pp. 31-34). But this is not a case of the Authority discriminating against Braniff as an excuse to discriminate against foreigners,[7] as in *Barcardi Corp. v.*

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[7] The Authority has never made the "Braniff argument" attributed to it by petitioners (Petition, p. 34), that the Authority need only discriminate against Braniff to justify discrimination against foreigners. The suggestion that counsel for the Authority argued to the Court of Appeals "in breach of its stipulation" before a district judge (Petition, p. 34) is wholly unwarranted, as is shown in our *Objections and Response to Appellees' Motion to Supplement Record on Appeal*, R. 721, *et seq.* Petitioners continually attempted to introduce new "evidence" before the Court of Appeals, and they continue in that effort before this Court, by printing in their Appendix (p. 41a) an irrelevant letter dated November 29, 1962, from a State Department lawyer to Mr. Schleit.

Domenech, 311 U. S. 150. The same charges "would be paid" by any new United States airline undertaking international service. Petitioners claim ambiguously that Article 15 requires "absolute equality" (Brief for Appellees, p. 49)[5] and that it does not contemplate "equality" with Braniff but "equality" with Pan American, which is claimed to compete more with petitioners. This argument is an afterthought. Neither Article 15 (R. 686) nor petitioners' Fifth Amended Complaint (R. 148) says anything about competition or competitors, and the legal question here involved would be the same if the positions were reversed and Braniff were the sustaining airline and Pan American the nonsustaining airline.

THIRD QUESTION: Petitioners find great fault (Petition, pp. 34-38) with the comments made by the Court of Appeals (Petitioners' App., p. 3a) upon the "favored-nation clause concept" applied by the District Court in interpreting Article 15. The Authority never contended and the Court of Appeals did not decide that the Chicago Convention contains a most favored *foreign* nation clause, which is the subject of extended analysis by petitioners (pp. 34-38).

---

[5] Petitioners' notions of "absolute equality" change from time to time. Petitioners successfully importuned the District Court to award them "refunds" of amounts allegedly paid by them in excess of what petitioners would have paid, calculated according to the schedule applicable to sustaining airlines (R. 428). On their cross-appeal, petitioners contended that "absolute equality" required that each of their aircraft be charged only the average charge per aircraft paid in a given period by Pan American in respect of its greater number of landings (Brief for Cross-Appellants, p. 8). Eventually, petitioners recognized that Article 15 speaks of "aircraft" charges and not of "airline" charges (R. 686), and suggested that the principle of "absolute equality" would dictate that they be charged, for each landing of their aircraft, one-thirtieth of the monthly rate applicable to daily scheduled flights of sustaining airlines above 270 flights per month, or about eighty-three cents (Brief for Appellees, p. 38).

Obviously, the Chicago Convention does not guarantee foreigners the most favored treatment extended to any foreigner. The contracting States agreed to treat foreigners as they treat nationals. But that does not constitute a guarantee that all foreigners will be accorded the treatment given the citizen who, because of reasonable classifications applicable infraterritorially, happens to occupy the most attractive position. That was the "favored nation clause concept" applied by the District Court, which might be more accurately termed a "most favored national aircraft clause concept." The United States agreed that each airport open to its national aircraft "was to be open under uniform conditions to the aircraft of the other contracting nations," and the Court of Appeals recognized that agreement (Petitioners' App., p. 10a). The authorities cited by the Court of Appeals are indeed "analogous to the instant situation" (Petitioners' App., p. 12a), in that they show that the application of reasonable classifications may be applied even under a "most favored nation" concept, unless the contrary intention is clearly expressed by treaty.

Fourth Question: Petitioners' fourth question introduces an argument made for the first time in this Court, that the various agreements between the President of the United States and the chief executives of several foreign countries grant petitioners rights greater than the rights established by the Chicago Convention. But those agreements were executed in substantially the form suggested by the Chicago Conference itself (Petition, p. 43), and the contracting States undertook "not to enter" any "obligations and understandings" inconsistently with the treaty (Article 82). It is unreasonable to suggest that, after the Senate advised and consented to the Chicago Convention, the President of the United States thereupon set about, in violation of the treaty and without the authority of the Senate, to extend to foreigners greater rights than those secured by the treaty. In the District Court the petitioning Panamanian airline, whose country did not ratify the Convention until recently, urged that the executive agreement with its nation had the same effect in this case as the Chicago Convention. And the District Court held that there was no "legal difference" (R. 391). The Court of Appeals assumed, as petitioners contended, that the Panamanian executive agreement "is as effective as the Chicago Convention" (Petitioners' App., p. 2a). In view of the fact that both of the lower courts adopted petitioners' contentions in this respect, it is inappropriate for petitioners to suggest that the opinion of the Court of Appeals "fails to deal with the issue" (Petition, p. 45). The bilateral executive agreements cannot in any case rise to greater stature than the multilateral treaty. *Reid* v. *Covert*, 354 U. S. 1, 17, n. 33.

The Court of Appeals properly interpreted the Chicago Convention consistently with laws of the United States.

In holding that Article 15 of the Chicago Convention does not purport to proscribe differences in charges based on reasonable classifications, applied uniformly and irrespective of nationality, the Court of Appeals properly construed the treaty consistently with prior and subsequent Acts of Congress on the same subject. It was that Court's duty to do so. *Whitney* v. *Robertson*, 124 U. S. 190; *Baker* v. *Carr*, 369 U. S. 186, 212.

The Fourteenth Amendment to the Constitution of the United States, upon which certain United States airlines relied in their pleadings (R. 26), forbids the States to deny any person the "equal" protection of the laws. But that provision condemns only arbitrary discrimination; and not classifications resting on reasonable distinctions and differences in position. See, e.g., *Allied Stores of Ohio, Inc.* v. *Bowers* (1959), 358 U. S. 522. By the Civil Aeronautics Act of 1938 Congress proscribed "unjust discrimination" in the charges of carriers by air. 52 Stat. 993, as amended, Tit. 49 U. S. C., §1374(b). By the Federal Airport Act of May 13, 1946, Congress specifically required adherence to that principle by airports, as a condition to the granting of Federal aid:

> "The airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ."

60 Stat. 176, 49 U. S. C., Sec. 1110(1).

It is significant that Congress enacted the Federal Airport Act in the very midst of hearings by the Senate Foreign Relations Committee regarding proposed ratification of the Chicago Convention. *Hearings on Executive A before the Committee on Foreign Relations, United States Senate*, 79th Cong., 1st and 2nd Sess., *passim.* The Senate obviously regarded Article 15 of the Chicago Convention as being consistent with the proscription of unjust discrimination incorporated in the new Federal Airport Act. It is preposterous to suppose that, in July, 1946, the Senate would advise and consent to a treaty that extended to foreign airlines, simply because they are foreigners, rights greater than those secured to United States airlines by the unjust discrimination proscription of the Federal Airport Act, enacted two months earlier, in May.

By the Act of July 30, 1947, the Surplus Property Act of 1944 was amended to require that "all property transferred for airport purposes shall be used and maintained for the use and benefit of the public, without unjust discrimination." 50 App. U. S. C., Sec. 1622(g)(2)(B). And again, the Act of March 18, 1950 applied the same principle to airports established and operated by the National Park Service. 16 U. S. C., Sec. 7d.

The Court of Appeals was obliged to construe the treaty consistently with acts of Congress enacted before and since the treaty was adopted, so as to give effect to each. *Whitney v. Robertson*, 124 U. S. 190. The lower court was obliged to construe the treaty, if possible, so that the Federal Airport Act of 1946 should not be repealed by it, and so that the principle of the treaty itself would not be rendered impotent by the subsequent amendment of the Surplus Property Act. *United States v. Lee Yen Tai*, 185 U. S. 213; *Baker v. Carr*, 369 U. S. 186, 212. The "only legal theory upon which this cause was permitted to proceed" by the District Court (R. 382) did violence not only to the letter and spirit of the treaty but also to the intention of Congress as repeatedly expressed. Petitioners' theory of recovery was properly rejected by the Court of Appeals.

Conclusion.

The decision of the Court of Appeals is in complete harmony with this Court's prior decisions. Petitioners have shown no departure, substantial or otherwise, from the ordinary course of judicial proceedings. The questions posed by petitioners are not genuine and they are not substantial. There are no special and important reasons for a review of the decision below. Indeed, the persistent attempts by petitioners to submit this case on ever-expanding issues other than the simple issue on which it was properly decided by the Court of Appeals makes it singularly inappropriate that it be heard again.

The difference in charges of which petitioners complain has already been mitigated by the Authority's attempts in good faith to adjust the existing disputes. The difference will be eliminated entirely in December, 1965, as "the present separate classifications of the two groups will then cease to exist." (Opinion, Petitioners' App., p. 10a). We cannot say whether the petitioning airlines are owned by their governments (Petition, p. 47), for that fact does not appear in the record. But if those governments deem it a "continuing source of friction in Latin-American relations" (Petition, p. 47) that their aircraft are admitted to Miami International Airport on the same conditions as are imposed on American aircraft, then those governments are asking too much of the Authority and of the Chicago Convention.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Proof of Service.

I, Chester Bedell, attorney for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of December, 1962, I served a copy of the foregoing Brief in Opposition on the petitioner by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Philip Schleit, Esq., 1757 K Street, N. W., Washington 6, D. C.; J. Leo McShane, Esq., 740 Ingraham Building, Miami 32, Florida; and William D. Donnelly, 1625 K Street, N. W., Washington 6, D. C.

Chester Bedell,
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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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INDEX

Page

I. "REASONABLENESS" OR "DISCRIMINATION" AS SUCH ARE NOT ISSUES 2

A. Enormous Discrepancy in Airport Charges Is Not "Based Principally" on Volume Discounts 2

B. The Letter of the Civil Aeronautics Administrator Is Entitled to No Weight Here 6

C. Florida State Court Decision Held That Charges Unjustly Discriminate 6

II. NEITHER THE CONVENTION NOR OTHER FEDERAL LAW AFFORDS BASIS FOR THE LOWER COURT'S CLASSIFICATION 7

A. The Chicago Convention Bars the Classification of National Aircraft Upon the Basis Approved by the Lower Court and Here Urged by Respondent 8

B. Accepted Rules of Construction Require That Effect Be Given To the Absence of Any Reference in Article 15(b) to "Class" of Aircraft 9

C. There Is No Merit in Respondent's Arguments Attempting to Justify the Classification of Aircraft of the Big Four So As to Exclude Landing Charges Paid by Them From the Standard of Comparison Under Article 15(b) of the Convention 10

(1) Enforcement of the Treaty Rights Claimed by Petitioners Involves No Conflict With Federal Statutes 10

(2) The Respondent's Argument as to Senate Intent in Advising Ratification of the Chicago Convention Is Apparently Based on a Fantastic Anachronism 11

(3) Circumstances at the Time Ratification Was Advised Afford No Support for Respondent's Classification 11

D. Argument That Petitioners Will Be Preferred Over United States Airlines Is Fallacious 14

Page

III. THE BILATERAL AGREEMENTS IGNORED BY THE COURT BELOW EVEN MORE CLEARLY ESTABLISH THE PARITY RIGHTS OF PETITIONERS 16

IV. CONCLUSION 17

CITATIONS

CASES:

Northeast Airlines, Inc. v. Walter Weiss, 113 So. 884 cert. denied 113 So. 2d 772 (Fla.) 6, 7, 10, 14

Regina Cargo Airlines, Inc., et al v. Board of County Commissioners of Dade County, Florida, No. 18,133, U. S. Court of Appeals for the Fifth Circuit 7

Ross v. McIntyre, 140 U.S. 453 12

Strother v. Lucas, 12 Pet. 410 12

Todok v. Union State Bank, 281 U.S. 449 15

TREATIES, EXECUTIVE AGREEMENTS AND STATUTES:

Agreements Respecting Air Transport Services (Bilaterals) With—

Brazil, September 6, 1946, Art. III(1), 61 Stat. (4) 4121, 4126, T.I.A.S. 1900 (effective October 6, 1946) 2, 16, 17

Colombia, October 24, 1956, Art. 7(a), effective provisionally January 1, 1957 (State Dep't Press Release, October 25, 1956) 2, 16, 17

Ecuador, January 8, 1947, Art. 3(a), 61 Stat. (3) 2773, 2774, T.I.A.S. 1606 (effective April 24, 1947) 2, 16, 17

Mexico, March 7, 1957, Art. VII(a), 8 U.S.T. & O.I.A. 295, 310, T.I.A.S. 3776 (effective June 5, 1957); August 15, 1960, Art. 7(a), 12 U.S.T. & O.I.A. 60, 65, T.I.A.S. 4675 (effective provisionally August 15, 1960, definitively January 17, 1961) 2, 16, 17

Panama, March 31, 1949, Art. III(a), 63 Stat. (3) 2450, 2452, T.I.A.S. 1932 (effective April 14, 1949) 2, 16, 17

Page

Peru, December 27, 1946, Art. 3(b), 61 Stat. (3) 2586, 2587, T.I.A.S. 1587 (effective December 27, 1946) 2, 16, 17

Venezuela, August 14, 1953, Art. 4(a), 4 U.S.T. & O.I.A. 1493, 1498, T.I.A.S. 2813 (effective August 22, 1953) 2, 16, 17

Bilateral Agreements. See Agreements Respecting Air Transport Services.

Chicago Convention. See Convention With Other Governments Respecting Civil Aviation.

Civil Aeronautics Act of 1938 6

Convention with Other Governments Respecting Civil Aviation (Chicago Convention) December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591 (effective April 4, 1947):

- Art. 15 .... 1, 2, 7, 8, 9, 12, 13, 14, 15, 16
- Art. 82 17

Executive Agreements. See Agreements Respecting Air Transport Services.

Federal Airport Act 6, 7, 10, 11, 14

Habana Convention on Commercial Aviation (Pan American) February 20, 1928, 47 Stat. (2) 1901, T.S. No. 840, effective as to the United States August 26, 1931 12

Pan American Convention on Commercial Aviation (Habana) February 20, 1928, 47 Stat. (2) 1901, T.S. No. 840, effective as to the United States August 26, 1931 12

MISCELLANEOUS:

Civil Aeronautics Administrator, Letter of March 19, 1957 .... 6, 7, 10, 11

Port Authority Resolution No. 56 .... 4, 6, 11, 13

Page

Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1-December 7, 1944, Dep't State Publication 2820 (1948):

- Commentary on the Developments of the Individual Articles of the Convention on International Civil Aviation—page 1383 14-15
- Minutes, Meeting of Subcommittee 2 of Committee 1, November 10, 1944—page 680 15

Surplus Property Act of 1944 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 627

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners
v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

Aside from reasserting the obvious fact that this case was not tried or decided on issues of "reasonableness" or "discrimination" as such, the brief of respondent is devoted principally to defending the lower court's decision on the theory that petitioners' rights under Article 15 of the Chicago Convention are fully maintained by subjecting all Latin-American airlines' aircraft to the same airport charges as are imposed on the aircraft of one small United States international airline.

As to the bilateral agreements of seven of petitioners the respondent's brief (Resp. Br., pp. 19-21) serves only to underline the fact that the lower court omitted to pass on them.

I.

"REASONABLENESS" OR "DISCRIMINATION" AS SUCH ARE NOT ISSUES

Respondent's brief is directed in part at least to the demolition of its own straw men. As it states (Resp. Br., pp. 9, 11), relief was not claimed in or granted by the district court on any theory of unreasonableness or unjust discrimination. Petitioners relied in the court of appeals and rely here solely on the Chicago Convention and the bilateral agreements with seven of the petitioners. Of course, no one can duck the fact that the differential in landing charge rates exacted of petitioners on the one hand and of Pan Am, by far the largest United States or foreign operator of international service, results in grave prejudice to petitioners' treaty right to opportunity to compete on an equal basis with United States aircraft, at least so far as airport landing charges are concerned.

A. Enormous Discrepancy in Airport Charges Is Not Based Principally on Volume Discounts

In passing, it is pertinent to refute the assertion of respondent (Resp. Br., p. 10) that the enormous discrepancy in the average landing charges paid by petitioners and by Pan Am, respectively, is "based principally" on the fact that Pan Am enjoys a much larger volume of landings and the charges to both petitioners and Pan Am are computed under rate schedules that are different but both of which use a monthly reducing sliding scale (Resp. Br. p. 10).

As shown on the following pages, compared with the average charge to Pan Am computed under the initial and highest charge brackets of the rate schedule of Pan Am (and others of the Big Four), the average charge to petitioner TAN[1] for a typical month and for 41 landings was 840 per cent greater. We may concede that the relative volume of Pan Am as compared with that of each of the petitioners accounts for the additional average discrepancy included in the 1800 per cent referred to in the Petition for Certiorari (pp. 15, 27a).

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[1] Petitioner Transportes Aereos Nacionales, S.A. of Honduras commonly known as TAN.

ACTUAL CHARGES TO TAN FOR AIRCRAFT LANDINGS AT MIAMI INTERNATIONAL AIRPORT IN MAY, 1960

Under Dade County Port Authority's Resolution No. 56 (R. 652 et seq.) for the Landing of 32 C-46's (48,000 lb.) and 9 DC-6-B's (93,000 lb.)—weights stipulated (Stip. Ex. 25)

		Total for 41 Landings	Average chg. for 41 Landings
Landings (Stip. Ex. 9, p. 62)	$688.50		
Passenger terminal charges (Stip. Ex. 9, p. 62)	787.00		
Cargo terminal charges [1] (Stip. Ex. 9, p. 62)	409.00		
Indirect charges:			
Gasoline and oil (Pl. Ex. 15, Sched. for May, 1960)	611.73		
Meals catering (Pl. Exh. 26, attached Ex. 1)	63.86		
		$2,560.09	$62.44

CHARGES "THAT WOULD BE PAID BY ITS [UNITED STATES'] NATIONAL AIRCRAFT ENGAGED IN SIMILAR INTERNATIONAL AIR SERVICLS" SUCH AS THOSE OF PAN AMERICAN FOR LANDINGS OF THE SAME AIRCRAFT IN THE SAME NUMBER IN THE SAME MONTH

Under the Rate Schedule Contained in the Big Four Lease Agreements (Art. II, para. 4) as Set Out in Stip. Ex. 2 (R. 632-634)

32 C-46's (48,000 lb.) computed as follows:					
31 landings equal 1 daily schedule for May:					
Basic chg. for 30,000 lb. aircraft	$200.00				
Excess over 30,000 lb.: 18,000 lb.					
At $1.00 per thousand 18,000 lb.	18.00				
		$218.00			
1 landing at 1/30 of monthly charge		7.27			
Total for 32 C-46's[1]			$225.27		
9 DC-6-B's (93,000 lb.) computed as follows:					
One daily schedule per month:					
Basic charge for 30,000 lb. aircaft	200.00				
Excess:					
Over 30,000 but not more than 75,000 lb.:					
At $1.00 per thousand: 45,000 lb.	45.00				
Over $75,000 but not more than 100,000 lb.:					
At $0.75 per thousand: 18,000 lb.	13.50				
Total for one daily schedule per month	$258.50				
Fraction (9/30) of charge for daily schedule per month where operated on less than daily basis			77.55		
				302.82	7.39

---

[1] Cargo terminal charges were eliminated by the Airport Authority on October 1, 1961 (See R. 692-749 1/2 and papers attached thereto).

B. The Letter of the Civil Aeronautics Administrator Is Entitled to No Weight Here

Respondent apparently founds much of its argument on the 1957 letter of the Civil Aeronautics Administrator (Resp. Br., pp. 13-14). The same letter was also quoted at length by the court of appeals (Pet. App., pp. 7a-9a) but not made a ground of decision by that court. This letter was written in reply to an informal complaint lodged by one of petitioners' present attorneys on behalf of four domestic and four foreign airlines (two of which are petitioners here). The question there involved was plainly different because the complaint was based solely on the Federal Airport Act. The quoted letter was manifestly not the result of an adversary proceeding, and the validity of a number of the factual premises is substantially impaired by evidence adduced in the trial of this case. No judicial review was possible under the provisions of the Civil Aeronautics Act of 1938 as that Act then read.

C. Florida Court Decision Held That Charges Unjustly Discriminate

Insofar as the Administrator's letter proceeds on the theory that the Resolution 56 rates are not unreasonable or discriminatory, the letter is robbed of any weight by the subsequent proceedings in the Florida courts, in which the same rates were successfully challenged by domestic airlines as being discriminatory and unreasonable. In *Northeast Airlines, Inc.* v. *Walter Weiss*, 113 So. 2d 884, cert. denied 113 So. 2d 772 (Fla.),[2] in which respondent's commissioners, sued as such, were defendants, the plaintiff challenged such charges as "discriminatory, unreasonable, unjust and unfair" and as being in violation of the Federal Airport Act. The complaint was held to state a cause of action over the objection that administrative remedies had not been exhausted. The case was settled before trial. In *Regina Cargo Airlines, Inc.* v. *Board of County Commrs.*, N. 18,133, U.S. Ct. of App. for the Fifth Circuit, the United States domestic airline cases to which respondent refers (Resp. Br., p. 8, note 5) were also settled on the same basis as the *Northeast* case, *supra*.

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[2] Respondent's brief is silent as to this decision, although cited by petitioners (Petition for Cert., p. 15) and not lacking in pertinence to respondent's argument.

The question whether the Resolution 56 rates of the County Port Authority are unreasonable and discriminatory is, to say the least, still an open question. Certainly that issue is not foreclosed by the letter of the Civil Aeronautics Administrator.

II.

NEITHER THE CONVENTION NOR OTHER FEDERAL LAW AFFORDS BASIS FOR THE LOWER COURT'S CLASSIFICATION

Insofar as the respondent's brief purports to meet the Petition for Certiorari, it contends that the decision of the court below proceeds on a single ground: That Article 15 of the Convention permits a classification of United States aircraft engaged in international air service dependent on whether or not the owners of such aircraft are parties to leasing contracts with the respondent (Resp. Br., pp. 2, 6, 7, 8, 9, 14, 15, 18, 21, 22-23).

A. The Chicago Convention Bars the "Classification" of National Aircraft Upon the Basis Approved by the Lower Court and Here Urged by Respondent

Article 15 of the Chicago Convention recognizes only the following distinctions in comparing foreign aircraft with national aircraft for the purpose of ascertaining entitlement to parity of charges:

(1) The division by Article 15 resulting from inclusion in Article 15(a) of "aircraft *not* engaged in scheduled international air services" and in Article 15(b) of "aircraft engaged in scheduled international air services". (Emphasis supplied.)

(2) The sub-divisions under Article 15(a) relating to non-scheduled aircraft further requiring that the comparison be with (a) "national aircraft of the same class" and (b) with "national aircraft . . . engaged in similar operations". Other than "national" there is no reference to ownership of the aircraft. Neither is there any reference to contracts or contract rights of persons who may happen to be the owners or operators of the aircraft.

(3) The division under Article 15(b), relating to scheduled aircraft, goes to only one basis of comparison: whether the foreign aircraft and national aircraft (both "engaged in scheduled international air services" in order to be in Article 15(b)) are also engaged in "similar" international air services.[3]

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[3] The reason for the substantial difference in language of paragraphs (a) and (b) of Article 15 is not clear. It may be that it was deemed necessary because of the form of the definitions of "air service" and "international air service" contained in Article 96.

In any event, petitioners' aircraft traffic into the Miami airport there is included an estimated portion of only 3 per cent that is non-scheduled.

There is here no room for denying petitioners' aircraft the right to landing charges not higher than those paid by aircraft of Pan Am engaged in similar international air services. Clearly the Convention affords no authority for classification of national aircraft because their owners have entered into contracts with the airport that present "infraterritorial inconsistencies" (Pet. App., p. 11a; Resp. Br., p. 17).

B. Accepted Rules of Construction Require That Effect be Given to the Absence of Any Reference in Art. 15(b) to "Class" of Aircraft

It is conceded that the aircraft of Pan Am charges for which are claimed by petitioners as applicable to their aircraft are engaged in "scheduled" and "similar" "international air services", the only basis of comparison set forth in Article 15(b). It is submitted that *exclusio unius* be given effect here. Even if the reference to "class" contained in Article 15(a) be regarded as permitting classification such as the lower court opinion approves (this despite the obvious reference to "class" of aircraft and not to class of ownership or class of contract under which operated), the absence of any such reference in Article 15(b) requires that the parties attached different meaning to Article 15(b).

Again, even if the language of the Convention might reasonably be said fairly to admit of two interpretations, one restrictive of private rights claimed thereunder, the other liberal and furthering the private rights, the more liberal construction is to be adopted. See cases cited (Petition, p. 22).

Respondent's quotations from the opinion of the court below (Resp. Br. bot. p. 14) make it clear that the court simply rewrote the treaty with a broad pen.

C. There Is No Merit in Respondent's Arguments Attempting to Justify the Classification of Aircraft of the Big Four So as to Exclude Landing Charges Paid by Them from the Standard of Comparison Under Article 15(b) of the Convention

Respondent argues that enforcement of the treaty rights claimed by petitioners would conflict with other Federal statutes and that it would result in a preference to petitioners as against United States airlines other than those of the Big Four (Resp. Br., pp. 8, 15, 22-23).

(1) *Enforcement of the treaty rights claimed by petitioners involves no conflict with Federal statutes.*—Respondents invoke the proscription of unjust discrimination contained in the Federal Airport Act, the Surplus Property Act of 1944, as amended, and a National Park Service statute (Resp. Br., pp. 22-23). This is a most curious argument. It is apparently founded on the erroneous premise that the prohibitions against "unjust discrimination" found in the several Acts, including the Federal Airport Act, are nugatory and that United States airlines cannot obtain any relief from the discrimination resulting from the landing charges enjoyed by the Big Four. The erroneous premise of respondent apparently traces to its reliance on the Civil Aeronautics Administrator's letter. As shown above, the letter of the Civil Aeronautics Administrator is a weak reed.

Furthermore, the respondent's premise is belied by the decision of the Florida court cited in the Petition and completely ignored by respondent. *Northeast Airlines v. Walter Weiss*, 113 So. 2d 884, cert. denied, 113 So. 2d 772 (Fla.) As pointed out in the Petition, page 15, and herein (*supra*, pp. 6-7) the Florida court in that case specifically upheld a complaint charging discrimination in the Dade County Port Authority charges under Resolution 56.

(2) *The respondent's argument as to Senate intent in advising ratification of the Chicago convention is based apparently on a fantastic anachronism.*—

The respondent points out that the Federal Airport Act was enacted shortly before the Senate advised ratification of the Chicago Convention (Resp. Br., p. 22) and suggests that the Senate could not, in advising ratification, have intended to confer on foreign airlines, rights "greater" than those secured to United States airlines by the "unjust discrimination" proscription contained in the Federal Airport Act. This assumes that the Federal Airport proscription was then known to the Senate to give no protection to United States airlines against the preferential landing charges enjoyed by the Big Four. This knowledge, so imputed to the Senate, in turn is apparently based by respondent on the determination contained in the letter of the Civil Aeronautics Administrator 11 years later that United States airlines were entitled to no such relief under the Federal Airport Act. At least, respondent cites no other basis for considering the proscription of the Federal Airport Act nugatory.

Thus the whole argument is founded on the attribution to the Senate of knowledge in 1946 of an administrator's letter not written until 1957.

(3) *Circumstances at the time ratification was advised afford no support for respondent's classification.*—

Referring to the circumstances existing at the time of advice and consent to ratification by the Senate (*Ross*

v. *McIntyre*, 140 U.S. 453, 475; *Strother* v. *Lucas*, 12 Pet. 410, 438) we find nothing to put the Senate on notice that the Miami airport would attempt any such invidious differential in charges exacted of landing aircraft, as is here involved. The Senate advised ratification of the Chicago Convention on July 25, 1946; it was duly ratified by the President on August 6, 1946 (61 Stat. 1180). At that time the important circumstances existing at Miami were as follows:

(a) The long-existing Habana Convention, Art. XXIV, had since 1931 imposed, and was still imposing, as part of the municipal law of the United States, and as to aircraft of at least five of the States of petitioners here parties, the same restriction that is imposed by Article 15 of the Chicago Convention (see Petition, p. 28, note 10); (b) The only airport charges for use of the Miami airport by international aircraft then established by the airport were those contained in the 20-year contracts of Pan American and the El Salvador airline, Taca (Cf. Petition, p. 13; Resp. Br. 15) dated December 11, 1945, and February 27, 1946, respectively (R. 377-378); (c) Airport charges for other international aircraft apparently had not yet been established by the Port Authority,[4] but the Pan Am and Taca contracts contemplated that the Port Authority might at any time enter into similar contracts with other airlines (Pet. App., p. 19a); (d) None of the petitioners was as yet flying into Miami.

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[4] The airport publicly commenced operation on March 3, 1946, offering domestic service only. It was not until September 24, 1946, that the Port Authority, by Resolution No. 56, effective September 30, 1946, promulgated airport charges for domestic and international aircraft "except aircraft of lessees whose charges have been established by contract prior to the adoption of this Resolution" (R. 652). (Petition, App., p. 5a).

Hence, if we indulge the presumption that the Senate and the President, at the time of the ratification of the Chicago Convention, are presumed to have acted with knowledge of the circumstances surrounding the landing charges at the Miami airport, they necessarily contemplated that foreign aircraft, as they began flying into Miami, would be charged for landing at rates "not higher than" those that "would be paid" by Pan Am and Taca. It seems clear that there was, and is now, no basis for attributing to the Senate and the President a purpose to include in the Chicago Convention authority to permit or demand of foreign aircraft landing charges 800 or 1800 per cent higher than those collected from Pan Am or Taca. It was only *after* ratification of the Treaty that the airport Authority adopted its Resolution No. 56 establishing for aircraft, other than those of the Big Four and Taca, substantially higher landing charges.

It is this post-ratification set of airport charges applicable to little more than 3 per cent of the landings[5]

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[5] The relative number of landings by United States aircraft in international service at Miami in the fiscal year 1958/1959 (the latest year as to which figures are of record) are as follows (Stip. Ex. 12-B; Petition for Certiorari, App., p. 21a.):

Airline	Total Landings by United States Aircraft in International Service	
	Number	Per cent
Pan American	8,196	87.10
National	907	9.63
Braniff	308	3.27
Total	9,411	100.00

Braniff's passenger traffic constitutes 2 per cent of the total international traffic at Miami.

of United States aircraft engaged in international air services that respondent contends petitioners must look in establishing landing charges properly chargeable to petitioners under the Treaty.

D. Argument That Petitioners Will be Preferred Over United States Airlines Is Fallacious

Proceeding on the assumed premise that its airport rate structure is completely cleared of any violation under the Federal Airport Act and that hence no United States airline can acquire equality of airport charges with the Big Four, respondent here urges that if petitioners prevail they will obtain "rights greater than those secured to United States airlines" (Resp. Br., p. 22). Presumably this embraces both United States airlines engaged solely in domestic service and those engaged in international service.

The domestic airlines may, in law, have a perfect case for equality of airport charges under the doctrine of *Northeast Airlines* v. *Weiss*, supra. But that question is not here. Furthermore, as to domestic airlines the question is irrelevant because the preparatory work of the negotiators of the Chicago Convention establishes that the contracting States fully recognize that airport charges for international aircraft might under the Convention be made lower than those for domestic aircraft. The Commentary on the Development of the Individual Articles of the Convention (proceedings of the International Civil Aviation Conference, Department of State publication 2820, Vol. 2, p. 1383) states:

> "*Article 15, Airport and similar charges*, represents a combination of Articles 9 and 22 of the United States draft convention. The drafting

> committee was asked by the fifth meeting of Subcommittee 2 to revise Article 22 in the light of the instructions on Article 9 referred by the fourth meeting, to make it clear that *there is no obligation implied to treat domestic aircraft the same as international*. . . . (Emphasis supplied)

See also Minutes, Meeting of Subcommittee of Committee I, November 10, 1944 (id., Vol. I, p. 686).

As to the possibility that lower rates to petitioners than to United States airlines engaged in *international* service might result, respondent's argument can refer only to Braniff International Airways, Inc.; the only United States airline which *has been* charged the same rates as petitioners. But respondent itself has rendered this argument academic. As pointed out in petitioners' motion in the Court of Appeals to suplement the record on appeal, respondent, as it admitted in its opposition (R. 725) under date July 1, 1961, entered into a new agreement with Braniff guaranteeing to the latter parity with any reduced rates that may ultimately be obtained by petitioners in this case (R. 700-703).

In *Todok v. Union State Bank*, 281 U.S. 449 (invoked by respondent (Resp. Br., p. 17)) the treaty rights claimed would have favored an alien homestead owner over "every citizen of Nebraska" (id., p. 456). Here, petitioners would be placed merely on a plane of equality with their major and principal United States competitors, Pan Am (and National when and if it resumes service to Cuba). Pan Am does 64.1 per cent and National 3.4 per cent of all international airline business at Miami (Pet. App., p. 20a). Respondent has already protected Braniff by the above mentioned contract.

III.

THE BILATERAL AGREEMENTS IGNORED BY THE COURT BELOW EVEN MORE CLEARLY ESTABLISH THE PARITY RIGHTS OF PETITIONERS

The district court had held that the bilateral Air Transport Services Agreements conferred the right of equality of airport charges upon seven of the ten petitioners, independently of the Chicago Convention (R. 391, 401, 426, 435). The court of appeals opinion gives no consideration to these executive agreements. One of the questions asserted in the Petition to be here involved was the effect of these bilaterals (Question No. 4, Pet., p. 3).

Respondent brushes aside this failure of the court of appeals to consider the seven bilaterals, on the argument that these Executive Agreements were merely dependent upon the Chicago Convention itself because they followed the form agreement adopted by the Chicago Conference. But Mr. W. L. Clayton, Assistant Secretary of State, at the Senate Foreign Relations Committee hearing on the Chicago Convention, pointed out that the Convention was a document *independent* of all other agreements drawn up at the Chicago Air Conference" (Petition, Appendix page 34a) (Emphasis supplied).

Respondent also appears to argue that the seven bilateral agreements were merely duplications of the airport provisions of the Chicago Convention. Therefore, respondent argues, it would be giving greater dignity to the bilaterals than the Convention itself, to enforce those treaty provisions; and that it would be "inconsistent" to grant relief under one treaty while denying relief under another. Respondent in effect argues that the provisions for equality of airport charges solemnly undertaken in the bilateral agreements with Brazil, Colombia, Ecuador, Mexico, Panama, Peru and Venezuela were completely meaningless and mere scraps of paper.

The provisions of the bilateral agreements separately entered into with the above sovereign nations were more specific than the Chicago Convention and contained nothing comparable to Article 82 of the Convention upon which the court of appeals relied to nullify the effectiveness of the Convention. The seven bilateral agreements should be considered by this Court.

IV.

CONCLUSION

The Brief In Opposition filed by respondent presents no considerations which in any way militate against the obvious general importance of the federal questions presented in the Petition for Writ of Certiorari. Respondent's Brief fails more signally to fortify the grounds of decision of the court of appeals.

It is therefore respectfully submitted that this Court should exercise its supervisory powers in issuing a Writ of Certiorari to review the decisions of the Court of Appeals for the Fifth Circuit in these cases.

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January 1963

Certificate of Service

I, PHILIP SCHLEIT, one of the attorneys for the petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of January 1963, I served the foregoing Reply Brief on the respondent by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to Thomas G. Spicer, Esq. Assistant General Counsel, Dade County Port Authority, P. O. Box 59-2075 A.M.F., Miami International Airport, Miami, Florida; Chester Bedell, Esq. 1520 Barnett National Bank Building, Jacksonville 2, Florida: and Paul G. Hyman, Esq., 228 N. E. Second Avenue, Miami 1, Florida.

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JOHN F. DAVIS, CLERK

No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY,
FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

I. The Emasculation of a Vital Provision of This World-Embracing Convention Is a Matter of Grave and Continuing General Importance to the United States 3

II. The Case Is Important to Five Sovereign Nations 7

III. All United States Airlines Treated Equally With Foreign Airlines at All Latin-American Airports 8

IV Respondent Has Unjustly Enriched Itself Through Treaty Violations 8

V. Five of the Foreign Airline Petitioners Compete *Only* With Pan American at Miami International Airport—viz. They Are Engaged in "Similar International Services" *Only* to Those of Pan American 10

VI. Airlines Are Important to National Pride for Latin American Nations 13

VII. Alliance for Progress Program Is Retarded and Frustrated By Decisions Such as That of the Court of Appeals 14

VIII. Miami International Airport Rate Structure Is a Recurring Treaty Problem 14

(a) Similar British and Dutch Airline Cases Now Pending 14

(b) Others Probable in 1966 16

Conclusion 17

Certificate 17

Appendix 1 18

CITATIONS

CASES: Page

Postal Telegraph Cable Co. v. Associated Press, 228 N.Y. 370, 127 N.E. 256 (1920) 6

The Amiable Isabella, 6 Wheat. 1 6

TREATIES, EXECUTIVE AGREEMENTS AND STATUTES:

Agreements Respecting Air Transport Services (Bilaterals) With—

Brazil, September 6, 1946, Art. III(1), 61 Stat. (4) 4121, 4126, T.I.A.S. 1900 (effective October 6, 1946) 8

Colombia, October 24, 1956, Art. 7(a), effective provisionally January 1, 1957 (State Dep't Press Release, October 25, 1956) 8

Ecuador, January 8, 1947, Art. 3(a), 61 Stat. (3) 2773, 2774, T.I.A.S. 1606 (effective April 24, 1947) 8

Mexico, March 7, 1957, Art. VII(a), 8 U.S.T. & O.I.A. 295, 310, T.I.A.S. 3776 (effective June 5, 1957); August 15, 1960, Art. 7(a), 12 U.S.T. & O.I.A. 60, 65, T.I.A.S. 4675 (effective provisionally August 15, 1960, definitively January 17, 1961) 8, 12, 13

Netherlands, April 3, 1957, T.I.A.S. 4782, effective April 3, 1957 15

Panama, March 31, 1949, Art. III(a), 63 Stat. (3) 2450, 2452, T.I.A.S. 1932 (effective April 14, 1949) 8

Peru, December 27, 1946, Art. 3(a), 61 Stat. (3) 2586, 2587, T.I.A.S. 1587 (effective December 27, 1946) 8

United Kingdom, February 11, 1946, 60 Stat. 1499, T.I.A.S. 1507, effective February 11, 1946 15

Venezuela, August 14, 1953, Art. 4(a), 4 U.S.T. & O.I.A. 1493, 1498, T.I.A.S. 2813 (effective August 22, 1953) 8, 10, 11

Page

Bilateral Agreements. See Agreements Respecting Air Transport Services.

Chicago Convention. See Convention With Other Governments Respecting Civil Aviation.

Convention of Commerce and Navigation with Great Britain, July 3, 1815, 8 Stat. 228 3

Convention with Other Governments Respecting Civil Aviation (Chicago Convention) December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591 (effective April 4, 1947):
  Art. 15 . . . . 2, 5, 6, 12

Interim Agreement on International Civil Aviation, 59 Stat. 1516 2

Treaty of Friendship, Commerce and Navigation with the Italian Republic February 2, 1948, 63(2) Stat. 2255 5

Treaty with the Netherlands, August 26, 1852, 10 Stat. 982 4

Miscellaneous:

Conroy, *The American Interpretation of the Most Favored Nation Clause*, 12 Cornell L.J. 326 3

Wilson, *Postwar Commercial Treaties of the United States*, 43 American Journal of International Law 4

IN THE

Supreme Court of the United States

October Term, 1962

No. 627

Aerovias Interamericanas de Panama, S.A., et al.,
and
Lineas Aereas de Nicaragua, S.A.,
Petitioners

v.

Board of County Commissioners of Dade County,
Florida, acting as the Dade County Port Authority.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of January 14, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed November 29, 1962, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The ten foreign airline petitioners seek equality of airport charges at the Miami International Airport with those of the principal United States international airlines. They rely on Article 15 of the Chicago Convention of 1944, a multi-lateral Convention:

> "any charges that may be imposed or permitted to be imposed by a contracting state for use of such [public] airports * * * by aircraft of any other contracting state *shall not be higher* * * * As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

Seven petitioners also rely on the more specific provisions in bilateral Air Transport Service Agreements not considered by the court of appeals.

Because the petition for certiorari laid no emphasis on what appeared to petitioners to be obvious, this petition for rehearing is filed principally to point out the importance of right decision in the matter.

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[1] 61 Stat. 1180, entered in force April 4, 1947. The Interim Agreement on International Civil Aviation 59 Stat. 1516, Department of State, Executive Agreement Series 469, was effective as to the United States June 6, 1945. Article VIII, section 9 contained virtually the same provisions as to airport charges as Article 15 of the Convention. The Big Four lease-contracts were not executed until December 1945 effective January 1, 1946.

I. THE EMASCULATION OF A VITAL PROVISION OF THIS WORLD-EMBRACING CONVENTION IS A MATTER OF GRAVE AND CONTINUING GENERAL IMPORTANCE TO THE UNITED STATES

The language of "national" treatment and the "no higher" phrase here involved has a history in United States agreements with other nations of at least 145 years. We have discovered no suggestion in that long history that exceptions may be lightly introduced by one party or that the plain objective may be defeated or evaded by introduction of theories of "classification". On the contrary, the history of development of the use of "national treatment" clauses shows that when the parties intend that there may be special treatment as to particular classes in the home State, the contracting States, including the United States, have been careful to plainly state that intention in the instrument.[2]

Precedent for the language under scrutiny is found in the Convention of Commerce and Navigation with Great Britain, July 3, 1815, 8 Stat. 228, 229, Art. 2, para. 2:

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[2] This care on the part of the United States in "national treatment" treaties may or may not be attributable to the almost universal condemnation of the policy of evasion adopted by the United States in interpreting and applying the "most-favored nation clause". See Conroy, *The American Interpretation of the Most Favored Nation Clause*, 12 Cornell 326, 343: "The record of the American State Department in its interpretation of the most favored nation clause and its conduct of the debates over interpretation is nothing to point to with pride, either from the standpoint of legal soundness of the arguments advanced, or from the standpoint of good faith and willingness to fulfill its promises. [p. 350] On the whole it may be said that, though the original introduction of the conditional form was justified, the American interpretation of conditional clauses and indeed its interpretation of the clause under any circumstances, has been marked too often by bad faith."

> "No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels, than those payable in the same ports by vessels of the United States; nor in the ports of any of his Brittanick majesty's territories in Europe on the vessels of the United States, than shall be payable in the same ports on British vessels."

Using the same forthright language, and avoiding the refinements incident to domestic theories of permissible classification under the use of the word "discrimination" or "invidious discrimination", the Treaty with the Netherlands August 26, 1852, Article III, 10 Stat. 982, 983 proclaimed February 6, 1853 provided:

> "Neither party shall impose upon the vessels of the other, whether carrying cargoes or arriving in ballast from either of the two countries, or any other country, any duties of tonnage, harbor dues, light-house, salvage, pilotage, quarantine, or port charges of any kind or denomination, which shall not be imposed in like cases on national vessels."

This Treaty also demonstrates that when the parties desire to except particular classes from operation of their agreement they so state. Article IV provides:

> "The present arrangement does not extend to the coasting-trade and fisheries of the two countries respectively, which are exclusively allowed to national vessels; . . ."

Furthermore, the outstanding feature of commercial treaties of the United States since the abandonment of the conditional most-favored nation clause by Secretary Hughes in 1923 has been the extensive application of "national treatment". Wilson, *Postwar Commercial Treaties of the United States*, 43 A. J. I. L. pp. 262,

265. And in these, when intending to reserve rights of classification the United States has been careful to spell out the reserved class. For example, when preserving the right of a State separately to classify its own corporations as against those of other States and of foreign countries, the United States has included the specific provision; e. g.:

> "The preceding sentence, and all provisions of this Treaty according to corporations and associations of the Italian Republic rights and privileges upon terms no less favorable than those now or hereafter accorded to corporations and associations of the United States of America, shall be construed as according such rights and privileges, in any state, territory or possession of the United States of America, upon terms no less favorable than those upon which such rights and privileges are or may hereafter be accorded therein to corporations and associations created or organized in other states, territories or possessions of the United States of America.

See Treaty of Friendship, Commerce and Navigation with the Italian Republic, February 2, 1948, Article II, para. 3, 63(2) Stat. 2255, 2258, (proclaimed August 5, 1949).

The opinion of the court of appeals has, in effect, rewritten the clear provisions of Article 15 of the Chicago Convention so as to sanction two different and unequal standards of national treatment on a "classification" theory dependent on whether or not an airline signed a twenty year lease agreement in 1945 or early 1946.[3] We have found no other judicial or administrative decision of the United States sanctioning two unequal standards of national treatment.

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[3] The proviso in Article 15 that foreign registered aircraft charges shall not be "higher" than those paid by "national aircraft engaged in similar international services" was modified by

Even under domestic law a classification of customers on the basis of preferred treatment for long term contractors has no basis in law. In the case of *Postal Telegraph Cable Co.* v. *Associated Press*, 228 N.Y. 370, 127 N.E. 256 (1920), Judge Cardozo wrote:

> But classes are not "just and reasonable" when the only principle of classification is one of order in time, with a resulting division between old customers and new. Favoritism would be unchecked if such classification were accepted. No one would assert *that a contract for a term of years would permit a carrier to discriminate in favor of old customers to the prejudice of new:* . . . (Emphasis supplied)

The preferred Big Four airlines leased properties *for their own exclusive use for 20 years.*[4] The so-called "underwriting" of deficits of the airport was a commitment to pay no more than any other airline including petitioners would have had to pay (Petition, pp. 38-42). The sole justification for denying equal airport charges to petitioners was the fact that they were never given the opportunity to sign similar long term lease contracts for similar consideration or *any consideration!* Respondent sharpens the issue by stating that it was

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the court of appeals. But this Court has said in *The Amiable Isabella*, 6 Wheat. 1, 72: "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, *upon any notion of equity or general convenience, or substantial justice.*" (Emphasis supplied)

[4] Suppose the leases had been for 99 years. Under the court of appeals opinion Article 15 of the treaty would then not be effective for 99 years. This conflicts with the view held by the State Department (Pet. App. 41a).

irrelevant that petitioners were not given such opportunity. (Br. Opp. p. 12)

II. THE CASE IS IMPORTANT TO FIVE SOVEREIGN NATIONS

Since the filing of the petition for writ of certiorari four sovereign nations (The Republics of Ecuador, Peru, Guatemala and Honduras) have requested that the Supreme Court review this case. A fifth nation, the Republic of Mexico, has protested the charges assessed its national airline which is almost 100% owned by the Republic of Mexico. We know of no case in the annals of the Supreme Court where it failed to review a case deemed by five nations to be important. What is important to those nations must be important to the United States. In fact we know of no case where even one nation requested that this Court grant certiorari and was denied.

Even without support by their governments this Court has denied certiorari in 188 years in only a handful of cases where an alien relying on treaty rights has sought review. *Certainly there is no case in which certiorari has been denied where the lower court did not even mention several treaties under which petitioners relied.*

The multi-lateral Chicago Convention has 98 contracting States. There are 49 similar bilateral agreements of the United States of which seven not considered by the court of appeals are here involved.

The court of appeals has stated the correct rule "that where a treaty admits of two constructions, one restrictive of and the other favorable to rights claimed under it, the latter is to be preferred". (Pet. App. p. 9a). But after so saying it did not construe the bilateral agreements at all. *A treaty can scarcely be "construed liberally" if it is not construed at all.* The court of appeals merely said that the Panama Agreement "for the purposes of this case, is as effective as the Chicago Convention". (Pet. App. p. 2a). It did not even acknowledge the existence of the Agreements with Brazil, Colombia, Ecuador, Mexico, Peru or Venezuela.

III. ALL UNITED STATES AIRLINES TREATED EQUALLY WITH FOREIGN AIRLINES AT ALL LATIN AMERICAN AIRPORTS

There was stipulated in the record the official publication of the International Civil Aviation Organization which shows that at all Latin American airports used by United States airlines in every instance they are charged equally with petitioners. This is regardless of long term contracts or alleged aid to some airport during its infancy.[5]

IV. RESPONDENT HAS UNJUSTLY ENRICHED ITSELF THROUGH TREATY VIOLATIONS

This is not a case where aliens have seized upon their treaty rights to seek equal charges which are *below cost* merely because some American has somehow achieved an undue preference *below cost*. The amounts of petitioners' payments in excess of Pan American's rates are *surplus* to the respondent Port Authority. That the excess sums paid by petitioners are *overcharges* is borne out by the stipulated facts of record including the respondent Port Authority's Bond Prospectus of March 3, 1960.[6]

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[5] Stip. Ex. 31, Manual of Airport and Air Navigation Facility Tariff—Publication of the International Civil Aviation Organization Doc. 7100—AT/707/7 Seventh Edition—January 1959, and Supplement thereto.

On February 16, 1960 respondent set aside in an escrow account $1,398,178.00 from *surplus* to cover the potential refunds in these cases. It has also been adding to the escrow fund at the rate of $25,000.00 per month from surplus so that the fund now exceeds 2¼ million dollars.[7] Studies made by respondent's airport engineers indicate that if petitioners' charges were lowered to those of the Big Four (Pan Am and others) the respondent in the future would still be easily able to meet all its obligations.[8]

That the amounts of petitioners' higher charges have in fact become *capital surpluses* of the respondent Port Authority is illustrated by the attached news clipping which appeared since this Court denied certiorari January 14, 1963 (Appendix 1). "Over two million dollars will now be used for *capital* improvements to "air condition, modernize and refurbish four finger docks" without obligation to repay the money as it had with Eastern Air Lines.

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[6] Stip. Ex. 18, page 24.

[7] Idem. In addition it is notable that the total "earned surplus" of the respondent Port Authority as of September 30, 1959 (from latest balance sheet of record) was $17,472,140.93. Stip. Ex. 18, page 34.

[8] Ibid. pages 41, 60-61, 11.

V. FIVE OF THE FOREIGN AIRLINE PETITIONERS COMPETE ONLY WITH PAN AMERICAN—VIZ. THEY ARE ENGAGED IN "SIMILIAR INTERNATIONAL SERVICES" ONLY TO THOSE OF PAN AMERICAN AT MIAMI INTERNATIONAL AIRPORT

One of the difficulties of a consolidated case of this kind with 10 plaintiffs having generally similar rights is that the mass effect tends to obfuscate the claims of some plaintiffs which may be clearly stronger than others.

That is, whatever merit there may be to the theory of the court of appeals to the effect that foreign airlines are only entitled to equality with the *highest* U. S. airline charges for those engaged in "similar international air services", the theory is obviously inapplicable to the *five* petitioning airlines of Mexico, Venezuela, Guatemala, Honduras and Nicaragua. Braniff International Airways does *not engage* in "similar international air services" to those of these five petitioners.

(a) The Venezuelan Airline

Let us take the example of the Venezuelan airline petitioner, Rutas Aereos Nacionales, S.A. (RANSA), a cargo airline, which began service in 1952. It relies in part upon the U.S.-Venezuelan bilateral Air Transport Services Agreement[9] which was never mentioned by the court of appeals. RANSA's rental payments to the Port Authority are higher than any of the original, lease-contractors except Pan American (Petition, p. 14). Pursuant to the bilateral agreement both U.S. and Venezuelan airlines operate between Miami, Florida and Caracas, Venezuela. The *only* U. S. airline designated by the United States Civil Aeronautics

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[9] 4 U.S.T. & O.I.A. 1493, TIAS 2813 (effective August 23, 1953).

Board to operate the route is Pan American World Airways (Pan American), and it operates passenger services in addition to 7 round-trip scheduled *all-cargo flights*.[10] The Venezuelan airline petitioner RANSA operates only *all-cargo flights*, operating 6 all-cargo flights per week.[11] Clearly RANSA insofar as cargo is concerned is engaged in "similar international services" to those of Pan American (Art. 4 of the bilateral), similar *only* to Pan American and indeed *identical*, parallel, and competitive cargo services.

Article 4 of the U. S.-Venezuelan bilateral requires equality of airport charges for Venezuelan airlines' aircraft engaged in "similar international services". Pan American's aircraft are the *only* U. S. aircraft in this route.

To the Venezuelan carrier, RANSA, it appears highly irrelevant and impertinent that a small U. S. international *passenger* airline Braniff which began service in 1955, *is not in the U. S.-Venezuelan air route at all* and doesn't fly closer than 700 miles to the boundaries of Venezuela, has had to pay equally high charges at Miami to those paid by RANSA at Miami. Does the Venezuelan airline RANSA have a type of galloping treaty rights, viz. valid from 1952 to 1955 before Braniff began to fly to Peru, invalid since 1955 and revivable if Braniff drops out of international service? Meanwhile Pan American and RANSA are charged equally at Caracas.[12]

Even a most restrictive interpretation of the Chicago Convention and the Venezuelan bilateral would seem to require equality of airport charges for RANSA and Pan American at Miami.

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[10] Stip. Ex. 13 page C-713.

[11] Ibid. page C-728.

[12] Stip. Ex. 31, *supra*.

(b) Three Airlines of Central America

The foreign airline petitioners of Guatemala, Honduras and Nicaragua compete in scheduled *passenger* and *cargo* service *only* with Pan American on routes between their capitals and Miami. At the airports of Guatemala, Honduras and Nicaragua, Pan American is charged *equal* to the three Central American airline petitioners.[13] These three countries have no bilaterals with the United States and rely only on Article 15 of the Chicago Convention which provides that in scheduled services their aircraft pay *no higher* than those of United States national aircraft engaged in "similar international services". Pan American's aircraft are the *only* U. S. aircraft so engaged. The services are "similar", parallel and practically identical services to those of Pan American. Yet they are charged 18 times that of Pan American. It seems indeed irrelevant to the treaty claims of these three foreign airlines that Braniff who doesn't fly within 1000 miles of their shores happens to pay the same as they do in Miami.

(c) The Mexican Airline

All United States airlines flying into Mexico are charged equal airport charges to those of Mexican airlines.[14] This is in accord with Article 15 of the Chicago Convention and Article VII of the United States-Mexico bilateral Air Transport Services Agreement not mentioned by the court of appeals. The bilateral spells out the U. S. and Mexican airline routes. It provides with great specificity as to the regulation of traffic capacities, and even the fares to the public are regulated (Art. XI). The objectives are "fair and equal opportunity for the airlines of each Party" (Art. VIII).

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[13] Stip. Ex. 31, *supra.*

[14] Ibid.

But despite this Agreement, the Mexican airline petitioner Guest pays 18 times the charges of Pan American at Miami International Airport.

VI. AIRLINES ARE IMPORTANT TO NATIONAL PRIDE FOR LATIN AMERICAN NATIONS

To most Americans an international airline is just another business. Only Americans who have spent a great deal of time in Latin America realize that a Latin American airliner carrying the national flag abroad is a matter of enormous prestige as well as national pride in these countries. The sight of a Peruvian airliner arriving from an international trip gives to a Peruvian the same pride that the Queen Mary or Queen Elizabeth give to the British, or John Glenn to the Americans.

For this and other reasons the Latin American governments therefore have a great awareness of their own airlines and how they fare abroad. They cannot understand the decision of a "North American" court which interprets a treaty for equality, as sanctioning airport charges on their airlines which for 20 years are 18 times higher than those paid by the great Pan American World Airways of "North America".

It is not surprising that five sovereign Latin American nations filed diplomatic notes with the State Department which were transmitted to this Court expressing great interest and concern as to this case.

VII. ALLIANCE FOR PROGRESS PROGRAM IS RETARDED AND FRUSTRATED BY DECISIONS SUCH AS THAT OF THE COURT OF APPEALS

Many of the good works of the United States are retarded and frustrated by unfair and unjust actions of various United States government administrative decisions and policies from time to time. Countries who have struggled to meet their treaty obligations are amazed that the United States, through a tortured interpretation finds a way out of its treaty obligations. Many Americans frequently express surprise and amazement at the undercurrent of feelings against the United States found so often through Latin America.

The answer lies in the type of thing, which the court of appeals has done here, and which happens frequently in administrative determinations which are either not subject to appeal to the courts or would be unpracticable to litigate because of the expense. Moreover, many times the Latin American nations hesitate to protest a treaty violation for fear of jeopardizing a U. S. loan or aid program. In other words they often feel that they have been "bought out" of their treaty rights in exchange for U. S. aid programs.

VIII. MIAMI INTERNATIONAL AIRPORT RATE STRUCTURE IS A RECURRING TREATY PROBLEM

(a) Similar British and Dutch Airline Cases Pending

There are now pending in the United States District Court similar cases of foreign airlines seeking equality of airport charges at Miami, which operate between their national territories and Miami. British Overseas Airways Corporation, British West Indian Airways and Bahamas Airways Limited, all owned by the United Kingdom, have had pending in the United States District Court for the Southern District of Florida for 18 months a complaint seeking similar relief at Miami to that sought by the petitioners.[15]

The Dutch airline Koninklijke Luchtvaart Maatschappij, N.V., (commonly known as K.L.M. Royal Dutch Airlines) also has had pending in the same District Court a similar complaint.[16] Both the British and Dutch airlines rely on bilateral agreements with the United States which provide for equality of airport charges in almost the identical language to the bilaterals in the case at bar.[17] LAN-Chile, the Chilean airline owned by the Republic of Chile, competes between Santiago, Chile and Miami only with Pan American Grace Airways, the aircraft landings of which were stipulated to be Pan American's at Miami.[18] LAN Chile relying on a similar bilateral has also filed a similar complaint.[19]

Counsel for the British and Dutch airlines have indicated that those companies will prosecute their cases to this Court regardless of the outcome of the case at bar. The British, Canadians and the Americans were the principal draftsmen of the Chicago Convention.

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[15] Case No. 11091-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

[16] Case No. 11,099-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

[17] United States-United Kingdom, the "Bermuda Agreement", February 11, 1946, 60 Stat. 1499; TIAS 1507, effective February 11, 1946; United States-Kingdom of the Netherlands, April 3, 1957, TIAS 4782, effective April 3, 1957.

[18] Stipulation in open Court (R. 355-356).

[19] Case No. 189-62-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

(b) Others Probable in 1966

Even though equality of airport charges is supposedly to be effected as of January 1, 1966, the concept of a sliding scale of charges based on the volume of landings will no doubt be perpetuated. The existing sliding scale utilized, decline according to volume at a ratio of 8 to 1.[20] The result is that a small foreign airline even on the same scale as Pan American in 1966 would pay an average of about 90% more per landing than a high volume operator such as Pan American. This was a matter of our cross-appeal to the court of appeals. The court of appeals did not consider it because it ruled completely against petitioners. Respondent's Brief in Opposition (p. 10) points up the difference in charges which occur to a considerable part because of the enormous discounts for volume allowed by the Port Authority's sliding scale of charges. Obviously discounts of this enormity are not based on a cost differential. If a charge scale graduated in a ratio of 8 for the smallest volume to 1 for the largest volume is vindicated, 16 to 1 or 50 to 1 might be expected in the future. Even the present 8 to 1 ratio, if continued in 1966, will undoubtedly be litigated by some of the present petitioners at that time.

The situation presented in case at bar represents a recurring treaty problem of great importance to the international relations of the United States.

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[20] Pan American Lease, Art. II Sec. 2—Stip. Ex. 2.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

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February 8, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s Philip Schleit
Counsel for petitioners

APPENDIX 1

The Miami Herald

January 16, 1963

Airlines' Court Plea Rejected

Airport 'Wins' In Fee Dispute

The U.S. Supreme Court has refused to hear a complaint by 10 Latin American airlines that they are entitled to lower landing fees at Miami International Airport.

The decision apparently clears the way for the Port Authority to get badly-needed improvements at the airport under way, Authority Director Alan C. Stewart said.

The 10 airlines complained they have to pay much higher rates than four American carriers — Delta, Eastern, National and Pan American — who get different rates under an earlier, 20-year contract which runs until 1966.

Federal Judge Joseph Lieb ruled in favor of the airlines here in July 1961, and ordered the Dade Port Authority to refund $769,000 to them. The ruling was reversed, however, by the Circuit Court of Appeals in New Orleans last Aug. 31. The Supreme Court's brief order Monday left the Circuit Court of Appeals ruling in effect.

The Latin lines complained they were charged 50 cents a passenger and $2 a [illegible] cargo which the Big Four domestic carriers did not pay. The cargo charges were lifted in October 1961, after Lieb's decision, but the passenger charge is still in effect.

Stewart said the Port Authority has been putting $25,000 a month into escrow in case the Latin lines won their suit and collected. He said the total amount in escrow is now more than two million dollars.

"Unless the lines win a rehearing," Stewart said, "this means we can turn loose our escrow fund and get back to modernizing the airport.

"The first thing we want to do is air condition, modernize and refurbish four finger docks. Concourse Six was done with money Eastern Air Lines loaned us and Concourse Two is being finished now. With the escrow money, we want to do Concourses One, Three, Four and Five."

"If we need it," the director concluded, "this will also give us some elastic money to float a bond issue. As far as the bonding houses are concerned, the $300,000 we have been putting into escrow means five million dollars in bonding power."

If the case concludes favorably, and the Metro Commission sitting as the Port Authority approves, Stewart said he was hopeful work on the finger docks could get under way in mid-April.